

NOV 17 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States**October Term, 1967****No. 416**

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

*Appellants,**against*

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

Filed November 16, 1967**Probable Jurisdiction Noted October 16, 1967**

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Docket Entries

| <i>Date</i> | <i>Proceedings</i> |
|-------------|---|
| DEC. 1-66 | Filed complaint and issued summons |
| Dec. 22-66 | Filed summons & return, served deft. by (Troia) & by reg. mail to Atty. Gen'l 12-6-66 |
| Feb. 20-67 | Filed defts' notice of motion to dismiss complaint-ret. 2-28-67 |
| Feb. 20-67 | Filed defts' memorandum of law |
| Feb. 21-67 | Filed stip & order extending deft's time to ans to 2-17-67-Motley, J. |
| Mar. 16-67 | Filed stip. & order extending plttfs' time to answer motion pursuant to F.R.C. 12(b) to 4-18-67—Metzner, J. |
| Apr. 7-67 | Filed plttfs' memorandum in opposition to motion to dismiss |
| Apr. 12-67 | Filed plttfs' notice of motion to convene a 3 judge court-ret. 4-18-67 |
| Apr. 12-67 | Filed plttfs' memorandum in support of its motion |
| Apr. 17-67 | Filed defts' memorandum of law |
| Apr. 18-67 | Filed defts' reply memorandum (filed in court) |
| Apr. 27-67 | Filed plttfs' memorandum of law |
| Apr. 27-67 | Filed Opinion #33,450—The motion to convene a 3-judge court will be granted, and the matter will be referred to the Chief Judge of this Circuit for that purpose. Defts' motion to dismiss will be held for the decision of the 3-judge court. It is so ordered—Frankel, J.-mailed notice |

Docket Entries

| <i>Date</i> | <i>Proceedings</i> |
|-------------|---|
| May 1-67 | Filed order designating Frankel, D.J.; Hays, C.J. & McGohey, D.J. for the hearing of a 3-judge court—Lumbard, C.J. |
| May 4-67 | Filed affdvt. & show cause order to intervene Rose Spira, et al as defts.-ret. before Frankel, J.-5-11-67 at 10:00 a.m. |
| May 4-67 | Filed memorandum in support of motion to intervene defts. |
| May 4-67 | Filed order setting hearing for 3-judge court hearing—to be held 5-25-67 at 10:00 a.m.-room 618—defts' brief in support of motion to dismiss shall be filed by 5-15-67—pltffs' answering brief shall be filed by 5-22-67; and defts' reply brief, if any, shall be filed by 5-24-67—Frankel, J. |
| May 8-67 | Filed Clerk's certificate of mailing re: notice setting hearing for 3 judge court to Hon. Ramsey Clark, Atty. Gen'l of USA-US Atty. & Leo Pfeffer |
| May 10-67 | Received return receipt re: service of Clerk's certificate of mailing of service of hearing date of statutory court hearing. |
| May 12-67 | Filed memorandum in opposition to motion to intervene |
| May 16-67 | Filed memorandum of proposed intervenors-defts. in support of motion to dismiss |
| May 17-67 | Filed affdvt. of Herbert Brownell in support of motion to intervene |
| May 17-67 | Filed reply memorandum in support of motion to intervene |
| May 22-67 | Filed pltffs' memorandum of law on motion to dismiss |

Docket Entries

| <i>Date</i> | <i>Proceedings</i> |
|-------------|--|
| May 25-67 | Filed Reply memorandum of proposed intervenors-defts. in support of motion to dismiss |
| May 25-67 | Before Hays, C.J.; McGohey, D.J. & Frankel, D.J.—Statutory court hearing held & concluded—decision reserved. |
| June 19-67 | Filed Statutory Court Opinion #33,681—Disposition of the case makes it unnecessary for us to pass upon the application of intervention—The Clerk is directed to dismiss the complaint for lack of jurisdiction of the subject matter.—Hays, C.J. & McGohey, D.J.—Dissenting Opinion by Frankel, D.J.—mailed notice |
| June 27-67 | Filed stip. & order amending caption correcting names of 2 plffs. as indicated—Frankel, J. |
| June 26-67 | Filed plffs' notice of appeal to the US Supreme Court |
| July 19-67 | Filed transcript of record of proceedings of 5-25-67 |
| July 20-67 | Filed affdvt. stip. & order directing the Clerk to transmit papers filed to the US Supreme Court—Tyler, J. |
| July 21-67 | Filed certification of record on appeal to the US Supreme Court |
| Oct. 19-67 | Filed true copy of order from United States Supreme Court—The statement of jurisdiction in this case having been submitted & considered by the court, probable jurisdiction is noted. |

Summons

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the above-named Defendants:

You are hereby summoned and required to serve upon Leo Pfeffer, plaintiffs' attorney, whose address is 15 East 84th Street, New York, N. Y. 10028, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John J. Olear, Jr.
Clerk of Court.

E. Ewinciger

Dated: December 1, 1966.

Note: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK —

[SAME TITLE]

I. Statement as to Jurisdiction

1. This is a civil action brought by the plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of the funds of the United States to finance, in whole or in part, instruction in sectarian schools, and to declare such use violative of the First and Fifth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 42, U. S. Code, Sections 1331, 2282, 2284, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand (\$10,000) Dollars, as more fully appears hereinafter.

4. Plaintiffs are each citizens of the United States and of the State of New York. Plaintiffs each pay income taxes to the United States and are each qualified legal voters of the United States. Plaintiffs are also each residents of and legal voters in the State of New York, and plaintiff Albert Shanker is a real property taxpayer in the State of New York. Plaintiff Helen D. Henkin has children regularly registered in and attending the elementary or secondary grades in the public schools of New York.

Complaint

5. Defendant John W. Gardner is Secretary of the United States Department of Health, Education and Welfare and is sued herein in that capacity. Defendant Harold Howe, 2d, is the Commissioner of Education of the United States and is sued herein in that capacity.

II. Factual Allegations

6. In 1965, the Congress of the United States enacted and, on April 11, 1965, the President of the United States approved P.L. 89-10, known as the Elementary and Secondary Education Act of 1965, Title I whereof authorizes Federal financial support for special educational programs for educationally deprived children in attendance areas where low income families are concentrated. Section 205 (2)(2) of the Act provides that, in order for a local educational agency to qualify for support from the Federal Government under such Title I, it must appear "that to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who attend non-public schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services) in which children can participate without full-time public school attendance."

7. The Elementary and Secondary Education Act of 1965 authorizes, empowers and requires the defendant Harold Howe, 2d, in his capacity as Commissioner of Education, to pass upon all applications for Federal funds to finance programs under the Act and to withhold approval from any program which does not comply with the terms, conditions and limitations of the Act.

8. It was not the intent of Congress in enacting Title I, Section 205(a)(2) to require local educational agencies, in

Complaint

order to qualify for Federal funds, to violate the prohibitions of the First Amendment to the United States Constitution, but that local educational agencies could qualify for Federal funds by providing programs within the limitations of the Federal Constitution.

9. There are many programs within the meaning of Title I of the Elementary and Secondary Education Act of 1965 which could practicably be instituted by local educational agencies which would qualify them for the receipt of Federal funds under the Act but which would not violate the provisions of the Federal Constitution. Among these programs are those to provide pupil health and dental benefits in public and nonpublic schools, and programs for special instruction in courses such as reading, arithmetic, music and art and for guidance conducted on publicly owned premises after regular school hours and open equally to children regularly registered in public and non-public schools.

10. On information and belief, the Board of Education of the City of New York, a local educational agency, has in fact instituted and continues to institute and conduct programs such as these and has on the basis thereof in fact qualified for and received Federal funds under Title I of the Elementary and Secondary Education Act of 1965.

11. On information and belief, it is feasible and practicable for the Board of Education of the City of New York to expand these constitutional programs and institute other constitutional programs and thereby qualify for and receive all the Federal funds to which it is entitled under the terms of the Elementary and Secondary Education Act of 1965.

Complaint

12. On information and belief, the defendant Harold Howe, 2d, by and with the consent and approval of defendant John W. Gardner, has in the past and, unless enjoined by this Court, will in the future approve programs whereunder substantial sums of Federal funds, greatly in excess of Ten Thousand (\$10,000) Dollars, allocated under Title I of the Elementary and Secondary Education Act of 1965 will be used to finance, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools.

13. On information and belief, large sums of Federal funds, the exact amounts whereof are not known to the plaintiffs, have been and continue to be used and, unless enjoined by this Court, will continue to be used to finance and aid, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in sectarian or religious schools.

14. Title II of the Elementary and Secondary Education Act of 1965 authorizes Federal financial support for the purchase of textbooks and instructional and library materials for use in elementary and secondary schools.

15. On information and belief, large sums of Federal funds, greatly in excess of Ten Thousand (\$10,000) Dollars, the exact amounts whereof are not known to the plaintiffs, with the consent and approval of the defendants, have been and continue to be used and, unless enjoined by this Court, will continue to be used, to finance the purchase of textbooks and instructional and library materials for use in religious and sectarian schools.

Complaint

III. Causes of Action

16. *First Count*: The determination and action of the defendants violate the First Amendment to the United States Constitution in that they constitute a law respecting an establishment of religion by reason of the fact that they effect a contribution of tax raised funds to the support of institutions which teach the tenets of a church and constitute governmental financing of religious groups and governmental action whose purpose and primary effect is to advance religion.

17. *Second Count*: The determination and action of the defendants violate the First Amendment to the United States Constitution in that they prohibit the free exercise of religion on the part of the plaintiffs and the class they represent by reason of the fact that they constitute compulsory taxation for religious purposes.

IV. Other Allegations

18. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

19. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

V. Prayers for Relief

20. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2282 and 2284 of the U. S. Code to declare unconstitutional the determination and action of the defendants as hereinbefore set forth.

Complaint

(2) That the court adjudge and declare that the determination and action of the defendants as hereinbefore set forth is not authorized or intended by the Elementary and Secondary Education Act of 1965, or in the alternative if such determination and action are within the authority and intent of the Act, the Act is to that extent unconstitutional and void.

(3) That the defendants and each of them be enjoined from approving any program for the expenditure of Federal funds to finance in whole or in part instruction or guidance services in religious and sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools.

(4) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief set forth herein:

(5) That the plaintiffs be granted such other and further relief as to the Court may seem just and proper.

December 1, 1966.

s/ Leo Pfeffer
Attorney for Plaintiffs

Notice of Motion to Dismiss
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that upon the complaint heretofore filed herein and the memorandum of law served and filed herewith, the undersigned will move this Court in Room 506, United States Court House, Foley Square, New York, N. Y., on the 28th day of February, 1967, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to F. R. Civ. Proc. 12(b) dismissing the complaint herein on the grounds that the plaintiffs do not have standing to maintain this action, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, N. Y.
February 16, 1967.

Yours, etc.,

Robert M. Morgenthau,
United States Attorney for the
Southern District of New York,
Attorney for Defendants.

By ARTHUR S. OLICK

Arthur S. Olick,
Assistant United States Attorney,
Office & Post Office Address:
United States Court House, Foley Sq.
New York, N. Y. 10007

To:

Leo Pfeffer, Esq.
15 East 84th Street
New York, N. Y. 10028

Notice of Motion to Convene Three-Judge Court**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]****SIR:**

PLEASE TAKE NOTICE that upon the complaint and defendants' memorandum of law heretofore filed herein, and plaintiffs' memorandum served and filed herewith, the undersigned will move this Court, in the United States Court House, Foley Square, New York, N. Y., on the 18th day of April, 1967, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, to convene a three-judge District Court pursuant to Title 28 of the United States Code, Section 2282, on the ground that plaintiffs seek interlocutory and permanent injunctions restraining the enforcement, operation and execution of an Act of Congress, namely Titles I and II of the Elementary and Secondary School Act of 1965, 20 U.S.C., Sections 241(a)-241(1), 821-827 (1965), that Act being repugnant to the First Amendment of the United States Constitution, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.

April 7, 1967.

Yours, etc.

Leo Pfeffer

Attorney for Plaintiffs

15 East 84th Street

New York, New York 10028

TR 9-4500

To:

Robert M. Morgenthau, Esq.

Attorney for Defendants

United States Attorney for the

Southern District of New York

United States Courthouse

Foley Square

New York, New York 10007

Decision of Frankel, J.**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****66 Civ. 4102****[SAME TITLE]****Appearances:**

Leo Pfeffer, Esq.
15 East 84th Street
New York, N. Y. 10028
Attorney for plaintiffs

Joseph B. Robison, Esq.
Donald M. Kresge, Esq.
Of Counsel

Robert M. Morgenthau, United States Attorney
for the Southern District of New York
Attorney for defendants

Arthur S. Olick, Assistant United States Attorney
Michael Hess, Assistant United States Attorney
Of Counsel

The seven plaintiffs brought this suit to enjoin the use of federal funds (1) to finance instruction in reading, arithmetic, and other subjects in religious and sectarian schools, and (2) for the purchase of textbooks and other instructional materials for use in such schools. They allege that defendants have been and are using federal funds for these purposes in administering Titles I and II of the Elementary and Secondary Education Act of 1965, 79 Stat. 27 *et seq.* (1965), 20 U.S.C. §§241a-1, 821-827 (Supp. 1966). Properly

Decision of Frankel, J.

construed, plaintiffs allege, the Act does not authorize such federal expenditures. If it does, they further contend, the statute must be struck down under the First Amendment, both as a "law respecting an establishment of religion" and as a "law . . . prohibiting the free exercise thereof . . ."

The complaint asserts that plaintiffs pay federal income taxes; that they are "qualified legal voters of the United States;" that they reside and vote in New York State; that one plaintiff (Shanker) is a "real property taxpayer" in New York; and that another (Henkin) "has children regularly registered in and attending the elementary or secondary grades in the public schools of New York." Invoking the court's jurisdiction under 28 U.S.C. §§1331, 2201, 2202, 2282, and 2284, plaintiffs have moved under the last two sections for the convening of a three-judge court. Defendants have moved under Fed. R. Civ. P. 12(b) for dismissal of the complaint on the ground that plaintiffs lack standing to sue.

The parties are agreed that a three-judge court should be convened unless plaintiffs' claims under the Federal Constitution are "plainly unsubstantial." *Ex parte Poresky*, 290 U. S. 30, 32 (1933). It seems also to be agreed—and the court would hold, in any event—that the substantive issues plaintiffs raise under the First Amendment are not "plainly unsubstantial," however those issues, if they are reached, may ultimately be resolved. Defendants urge, however, that the absence of standing is so clear that the action must be dismissed at this stage by a single judge. And it is common ground that the test of substantiality should be applied to the question of standing in determining whether there is basis for the calling of a three-judge court.

The able briefs on both sides focus upon the decision in *Frothingham v. Mellon*, 262 U. S. 447 (1923), where a taxpayer sought unsuccessfully to enjoin administration of the

Decision of Frankel, J.

Maternity Act of 1921, claiming that the statute invaded the powers reserved to the States under the Tenth Amendment and otherwise exceeded the constitutional authority of the Congress, so that its effect was to take the taxpayer's property, "under the guise of taxation, without due process of law." *Id.* at 480. In a brief opinion which has led since to a good deal of exegetical writing, the Supreme Court held that the interest of a taxpayer in the national fisc "is shared with millions of others; is comparatively minute and undeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court equity." *Id.* at 487. Accordingly, the Court said, considering the separate powers of the separate branches under the Constitution, the taxpayer, as such, cannot make the showing, requisite for judicial review of a statute, "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488.

The doctrine of *Frothingham*, defendants urge, "is dispositive of this case." Their argument is a powerful one. It may well be accepted ultimately as the obligatory ground for decision at the district court level. It has lately been held by another district judge to be so clearly correct as to require dismissal of a similar suit without the summoning of a three-judge court. *Protestants and Other Americans United v. United States*, S.D. Ohio, No. 3303, March 20, 1967.¹ Nevertheless, with all deference to that Court, the

1. The complaint in that case, similarly attacking the Elementary and Secondary Education Act, contained a prayer on behalf of the individual plaintiffs for damages of \$5,000,000. It may be permissible to say, even at this far remove, that this grandiose novelty may have appeared to sound a somewhat bizarre note. Strictly speaking, however, the decision of the Ohio District Court goes squarely on *Frothingham*, and does not indicate that any significance was attached to the prayer for damages in reaching the conclusion that the plaintiffs patently lacked standing.

Decision of Frankel, J.

claim of the present plaintiffs to standing does not appear to fall to the level of *plain* unsubstantiality warranting dismissal by a single judge.

1. Even apart from the possibly material distinctions between the First Amendment problem here and the purely economic interest asserted in *Frothingham*, that decision has been the subject of weighty criticism in the years since 1923. See, e.g., *Public Affairs Press v. Rickover*, 369 U. S. 111, 114-15 (1962) (Douglas, J., concurring); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1266, 1284 (1961); 3 Davis, *Administrative Law*, Sec. 22.09 (1958); Davis, "Judicial Control of Administrative Action": A Review, 86 Colum. L. Rev. 635, 659-69 (1966); Wright, *Federal Courts* 37 (1963). The critics have noted, among other things, that the nature of taxpayers' interests has changed as the size of the economy and government has burgeoned in the period of almost half a century since *Frothingham*. The interest of state taxpayers in the treasuries of at least several large States may be even more "remote, fluctuating and uncertain" than *Frothingham's* federal interest in 1923. Yet state taxpayers retain their standing to raise federal constitutional issues in the Supreme Court. The arguable point of this is that *Frothingham* does not announce a limitation on standing compelled by Article III of the Constitution—and, indeed, as plaintiffs stress, the decision was not expressly stated to rest upon such a mandate.

There are answers, perhaps complete ones, to that thought. But it does not seem either necessary or appropriate to pursue them to any final conclusions. The limited office of this memorandum is to sketch arguments which appear to defeat defendants' assertion of plain unsubstantiality.

Decision of Frankel, J.

2. Defendants make the point that the Senate has recently passed a bill (S. 3, 90th Cong., 1st Sess.)—identical with a bill passed by the Senate, but not the House, in the prior Congress—which would give to any federal taxpayer the right to raise in a suit for a declaratory judgment the First Amendment questions tendered here, with no “additional showing of direct or indirect financial or other injury, actual or prospective, on the part of the plaintiff * * * required for the maintenance of any such action.” Sec. 3(a).² “The very fact that such legislation is before the Congress,” defendants argue, “demonstrates that this Court is without jurisdiction to consider the merits of the present controversy.”³ There is room for argument, however, that the Senate’s action “demonstrates”—or, at least, suggests—other things.

The report on S. 3, S. Rep. No. 85, 90th Cong., 1st Sess. (1967), reflects careful study and the participation of notable scholars. It outlines not only the deliberations of the Committee on the Judiciary, but the participation in the legislative drafting of the Attorney General and the Solicitor General (*id.*, p. 2)—both, along with the Senate, bound by and sensitive to the pertinent commands of the Constitution. And it states the studied conclusion that “the *Frothingham* decision was founded on grounds other than purely constitutional ones.” *Id.*, p. 4. Indeed, the passage of the bill by the Senate rests upon the weighty, if not final, judgment that this conclusion is correct. Cf. *Muskrat v. United States*, 219 U. S. 346 (1911).

2. Subsection (b) of Section 3 of the bill goes on to give standing far more sweepingly to “[a]ny citizen,” and “citizen” is defined in subsection (c) to include a corporation. Both the taxpayer provision and the broader “citizen” subsection confer upon plaintiffs the right to bring their actions as broad class suits.

3. Defendants’ Reply Memorandum, p. 4.

Decision of Frankel, J.

As to the separation of powers, the report on S. 3 contains this interesting passage (p. 7):

"One of the initial sponsors of this legislation, Senator Wayne Morse, declared in his testimony before the subcommittee: 'I think we will greatly strengthen our whole system of three coordinate and coequal branches of government if we provide in a broad bill a jurisdictional basis for judicial review. The bill recognizes that the final power to adjudicate controversies arising under the Constitution rests in the courts rather than the Congress.' "

The report also contains material favorable to defendants' view. Considering the narrow scope of the present memorandum, there is no need to exhaust this material, but one passage should certainly be quoted (*ibid.*):

"Several cases are now pending which challenge the constitutionality of the Elementary and Secondary Education Act of 1965. The pendency of these cases may be cited by opponents of Judicial review as a substitute for legislation. The committee feels, however, that if the question of standing is raised by the defendants in these cases, they will undoubtedly be successful under the present state of the law."

Contrary to that observation, this court is proceeding on the view that the ultimate success of defendants on the standing issue is not "undoubtedly" assured. Taking altogether the work of the Senate and its Committee on this subject, we find in it enough suggestion of plausible doubt to add weight to plaintiffs' thesis that they have enough to justify the attentions of a three-judge court.

3. Continuing only to ask whether plaintiffs show the requisite minimum of substance, it bears mention that respectable arguments may flow from the difference in sub-

Decision of Frankel, J.

ject matter between *Frothingham* and this case, and from related differences in the asserted bases for the claim standing. The alleged injury here is not merely, or mainly, economic loss. And the roles in which plaintiffs allege injury are not simply their roles as taxpayers. When the Founders proscribed laws "respecting an establishment of religion," their aim, as Madison described it, was to make it impossible "to force a citizen to contribute three pence only of his property for the support of any one [church] establishment * * *." *Memorial and Remonstrance Against Religious Assessments*, quoted in *Everson v. Board of Education*, 330 U. S. 1, 63-66 (1947) (Appendix to dissent of Rutledge, J.). It is banal but relevant to say that the concern was not over the three pence. The concern was with a specially cherished form of spiritual and intellectual freedom. And so it is arguable that the essentially economic analysis in *Frothingham* cannot be dispositive in a case of this kind.

It may not be unfair in this connection to note that defendants' argument would extend logically to the case of a federal appropriation for the building of a cathedral for some particular sect. Assuming that no taxpayer as such would have standing because of *Frothingham*, would it follow that nobody had standing to attack such an expenditure? Could it be assailed, for example, by people of different religions or no religion living in the neighborhood of the proposed structure? If it could, it may turn out that the allegations of the present plaintiffs concerning their interests as parents and holders of real property have weight on the standing question of a kind wholly absent from *Frothingham*.

The First Amendment forbids not only aid to religions, but actions that might "influence a person to go to or to remain away from church against his will * * *." *Everson v. Board of Education*, 330 U. S. 1, 15 (1947). It could rationally be contended that financial support of sectarian

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institutions may exert an impermissible "influence" upon persons outside the aided groups. The argument may not succeed in the final analysis. But it serves as a suggestion of additional grounds for claiming that the standing of the present plaintiffs is more broadly based than was the taxpayer status of Mrs. Frothingham.

4. The foregoing thoughts merely graze an enormous area that has been the subject of lengthy and difficult opinions by the Supreme Court in recent years. The general drift of First Amendment jurisprudence may plausibly be appraised as moving toward increasingly relaxed criteria for the achievement of standing to sue. See, e.g., *Abington School District v. Schempp*, 374 U. S. 203, 266 n.30 (1963) (Brennan, J., concurring); *Dombrowski v. Pfister*, 380 U. S. 479, 486-87 (1965); *Reed Enterprises v. Corcoran*, 354 F.2d 519, 523 (D. C. Cir. 1965); Kurland, "The Regents' Prayer Case," *The Supreme Court Review* (1962). This is not the time to essay a final analysis of the movement—to determine, among several questions, how far the cases attacking state action should be deemed inapposite in the federal area even though it is the "Congress" to which the First Amendment was first and literally addressed. It is enough that the potential results of such an analysis are not predictable with the certainty that would warrant dismissal of plaintiffs' action by a single judge.

Accordingly, the motion to convene a three-judge court will be granted, and the matter will be referred to the Chief Judge of this Circuit for that purpose. Defendants' motion to dismiss will be held for the decision of the three-judge court.

It is so ordered.

Dated: New York, New York
April 27, 1967

MARVIN E. FRANKEL
U.S.D.J.

Decision of District Court on Motion to Dismiss

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

(Argued May 25, 1967)

Decided June 19, 1967)

Before:

Hays, Circuit Judge and McGohey and Frankel, District Judges.

Leo Pfeffer, New York, New York (Joseph B. Robison and Donald M. Kresge, on the brief),
for Plaintiffs,

Arthur S. Olick (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Michael D. Hess, Assistant U. S. Attorney, on the brief), *for Defendants,*

Thomas F. Daly, New York, New York (Lord, Day & Lord, Julius Berman, Reuben E. Gross and Marcel Weber, on the brief), *for Proposed Intervenor.*

HAYS, Circuit Judge:

This is an action to enjoin the defendants from using federal funds to finance guidance services and instruction in reading, arithmetic and other subjects in religiously operated schools, and to prevent the expenditure of federal funds for the purchase of textbooks and other instructional materials for use in such schools. It is alleged that defendants are using federal funds for these purposes in admin-

Decision of District Court on Motion to Dismiss

istering Titles I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§241 a-1, 821-27 (Supp. I, 1965).

Plaintiffs requested that a three-judge court be convened pursuant to 28 U.S.C. §§2282, 2284 to consider their contention that if these expenditures are authorized by the Act the statute constitutes a "law respecting an establishment of religion" and a law "prohibiting the free exercise thereof" in violation of the First Amendment to the Constitution of the United States. Defendants opposed the application for the convening of a three-judge court and moved to dismiss the complaint on the ground that plaintiffs lack standing to sue. The application for a three-judge court was granted. See *Flast v. Gardner*, 66 Civ. 4102 (S.D.N.Y. April 27, 1967). We must decide defendants' motion to dismiss the complaint.

A group of parents whose children attend religiously operated schools and receive or are eligible to receive special educational help available under the Elementary and Secondary Education Act of 1965 have requested leave to intervene as defendants in this action.

We hold that plaintiffs have no standing to bring this action, that there is thus no justiciable controversy and this court therefore lacks jurisdiction of the subject matter. Our disposition of the case makes it unnecessary, for reasons set out more fully below, to pass on the application for intervention.

I.

The issue of plaintiffs' standing has been presented separately and we have received briefs and heard argument only on this preliminary issue.

It is clear that if plaintiffs have standing to sue it is because they pay federal income taxes.

Consideration of the standing of a federal taxpayer to sue to prevent the depletion of the federal treasury caused

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by the expenditure of federal funds for unconstitutional purposes must begin with the Supreme Court's decision in *Frothingham v. Mellon*, 262 U. S. 447 (1923). In that case a taxpayer sought to enjoin administration of the Maternity Act of 1921 which provided for the appropriation of federal funds to combat maternal and infant mortality. The taxpayer claimed that by enacting the statute Congress had exceeded its powers and had usurped powers reserved to the states by the Tenth Amendment to the Constitution, and that the effect of the appropriation would be "to increase the burden of future taxation and thereby take her property without due process of law." 262 U. S. at 486.

The Supreme Court distinguished cases permitting municipal taxpayers to sue to enjoin the expenditure of municipal funds and stated that the interest of a federal taxpayer "in the moneys of the Treasury * * * is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." 262 U. S. at 487.

The Court held that a federal taxpayer, as such, cannot make the showing, necessary for obtaining judicial review of a statute, "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." 262 U. S. at 488.

Plaintiffs contend that the *Frothingham* decision establishes a rule of judicial self-restraint rather than a limitation on the jurisdiction of the federal courts under Article III, Section 2 of the Federal Constitution. They argue that viewed as an expression of the policy of judicial self-restraint the *Frothingham* rule has no application to issues arising out of the Free Exercise and Establishment Clauses of the First Amendment.

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Since the *Frothingham* decision is binding on this court regardless of whether it states a constitutional principle or a rule of policy, we need not consider the much debated question whether the rule is one of constitutional dimension.¹ Moreover, plaintiffs' attempt to distinguish *Frothingham* on the ground that the instant litigation involves rights protected by the First Amendment must be rejected in light of the Supreme Court's decision in *Doremus v. Board of Education*, 342 U. S. 429 (1952). In that case a group of taxpayers sought a judgment declaring unconstitutional under the Establishment Clause a New Jersey statute that provided for the reading of verses from the Old Testament at the beginning of each school day. The Supreme Court, citing *Frothingham v. Mellon* and quoting from its opinion in that case, held that plaintiffs lacked standing to raise this First Amendment claim:

"Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.' *Massachusetts v. Mellon*, *supra*, at 488.

1. See, e.g., *Doremus v. Board of Education*, 342 U. S. 429, 434-35 (1952); Davis, "Judicial Control of Administrative Action": A Review, 66 Colum. L. Rev. 635, 666 (1966); 3 Davis, Administrative Law, §22.09, at 243 (1958) and §22.10, at 64 (Supp. 1965); S. Rep. No. 85, 90th Cong., 1st Sess. 4 (1967); Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., Part 2, 492-501 (1966) (Statements of Professors Davis, Griswold and Freund); 111 Cong. Rec. 6131-32 (1965) (remarks of Representative Celler).

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It is true that this Court found a justiciable controversy in *Everson v. Board of Education*, 330 U. S. 1. But *Everson* showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not.

We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case of controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here." 342 U. S. at 434-35. See, e.g., *Elliott v. White*, 23 F.2d 997 (D. C. Cir. 1928); *Protestants and Other Americans United v. United States*, No. 3303 (S.D. Ohio, March 20, 1967); cf. *Abington School Dist. v. Schempp*, 374 U. S. 203, 224 n.9 (1963); 111 Cong. Rec. 7317-18 (1965); S. Rep. No. 85, 90th Cong., 1st Sess. 5-7, 17-18 (1967).

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As the quoted material makes clear, *Everson v. Board of Education*, 330 U. S. 1 (1947) does not support plaintiff's position since that action was brought by a local taxpayer whose economic interests were directly affected by local school board expenditures. Inapposite too are cases such as *Abington School District v. Schempp*, supra; *Engel v. Vitale*, 370 U. S. 421 (1962); *Zorach v. Clauson*, 343 U. S. 306 (1952); and *McCollum v. Board of Education*, 333 U. S. 203 (1948). In each of these cases the plaintiffs were either children attending public schools or their parents who were "directly affected by the laws and practices against which their complaints are directed." *Abington School District v. Schempp*, supra, 374 U. S. at 224 n.9; see *Zorach v. Clauson*, supra, 343 U. S. at 309 n.4; cf. *McGowan v. Maryland*, 366 U. S. 420, 429-31 (1961).

Finally, although the *Frothingham* rule has been criticized² the case has never been overruled or limited by the Supreme Court;³ indeed, the citation of *Frothingham* in the recent case of *Abbott Laboratories v. Gardner*, 35 U. S. L. Week 4433, 4438 (U. S. May 22, 1967) attests to its continuing vitality. That the Senate has recently passed a bill for the express purpose of creating an exception to the *Frothingham* rule by conferring standing on any federal taxpayer to raise the First Amendment questions tendered here (see S. 3, 90th Cong., 1st Sess.; S. Rep. No. 85, 90th Cong., 1st Sess. 4-7 (1967), further supports our conclusion.

2. See, e.g., Davis, "Judicial Control of Administrative Action": A Review, 66 Colum. L. Rev. 635, 659-69 (1966); Davis, Administrative Law §22.09 (1958); Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., Part 2, 492-96, 498-500 (1966); but see Dean Griswold's view, Hearings, supra, 496-97 (1966); Note, Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895, 918-19 (1960).

3. But cf. *Public Affairs Associates, Inc. v. Richover*, 369 U. S. 111, 114 (1962) (concurring opinion).

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II.

Our disposition of the case makes it unnecessary for us to pass upon the application for intervention. The involvement of the proposed intervenors in the consideration of the motion to dismiss could not have been greater had the motion to intervene been granted. They have filed briefs and participated in oral argument. The contention on which they base their claim that their interests will not be adequately represented by the present defendants, that if the Elementary and Secondary Education Act did not confer equal benefits on parochial school children it would interfere with their right of free exercise of their religion, would be material only if this court were to reach the merits of plaintiffs' complaint. Since we do not reach the merits we need not decide whether this argument of the proposed intervenors requires that permission to intervene be granted.

The Clerk is directed to dismiss the complaint for lack of jurisdiction of the subject matter.

PAUL R. HAYS

U.S.C.J.

JOHN F. X. MCGOHEY

June 19, 1967

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FRANKEL, District Judge (dissenting):

There is no disagreement among us as to the principle that we ought almost invariably to follow rather than anticipate Supreme Court precedents. Unless the Supreme Court has made perfectly clear that one of its earlier cases is about to be overruled,¹ or unless a decision has been eviscerated without benefit of Shepard's formal rites,² we are to adhere faithfully to the precedents given us at our time of decision. Granting the force of these principles, I cannot agree that the course we should follow here is charted by *Frothingham v. Mellon*, 262 U. S. 447 (1923), or any other single decision. The Supreme Court has never confronted directly the troublesome question of standing we have in this case. And I believe that the doctrines of the Court's decisions relevant to our inquiry entail a conclusion contrary to that of the majority. Accordingly, with the utmost deference, I must respectfully dissent from the decision that plaintiffs lack standing.

In organizing the thoughts leading to this conclusion, it has seemed convenient to begin with an affirmative statement of the reasons for holding that plaintiffs have standing, and to turn then to the grounds for distinguishing *Frothingham*. I shall proceed in that order.

I.

It is appropriate, whether or not it should be necessary, to emphasize at the outset that our divergent conclusions on standing import no views as to whether plaintiffs would ultimately prevail on the merits. See *Baker v. Carr*, 369 U. S. 186, 208 (1962). Given only that the issues posed un-

1. See *Barnette v. West Virginia Board of Ed.*, 47 F. Supp. 251, 252-253 (S.D.W.Va. 1942), *aff'd*, 319 U. S. 624 (1943).

2. See *Gold v. DiCarlo*, 235 F. Supp. 817, 818-20 (S.D.N.Y. 1964), *aff'd*, 380 U. S. 520 (1965).

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der the First amendment are not frivolous,³ the issue decided today could not be affected by a forecast, if we made one; that the complaint must ultimately be dismissed on substantive grounds. Cf. *Bell v. Hood*, 327 U. S. 678, 683 (1946). On the other hand, to complete the perspective, the Government acknowledges that its arguments opposing plaintiffs' standing would be no different if the case involved federal appropriations to build churches for particular sects—i.e., presumably clear violations of the First Amendment's ban against laws "respecting an establishment of religion * * *".

In a word, the issue decided today may be stated this way: Does a plaintiff, suing as a federal "citizen and taxpayer," assert "a legally cognizable injury," sustained by

3. A proposition earlier, and properly, conceded by defendants. The Government moved for dismissal by a single judge, without convening a three-judge court, when the case first came to me, on the sole ground that the claim of *standing* lacked sufficient substance to be heard by three judges. It was acknowledged at the time that no similar contention was being made with respect to the merits of the complaint. Cf. Department of Health, Education, and Welfare, *Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education*, 50 Geo. L. J. 349 (1961).

4. This concession by the Government, though not binding upon us, would seem inevitable as a matter of logic and intellectual honesty that have characterized the efforts of government counsel in this case as in others. No less properly, government counsel noted that the unlikely case of an appropriation to build a church might fortuitously give standing to someone other than a taxpayer—e.g., a property owner resisting condemnation of his land for the questioned purpose. But that sort of remotely possible happenstance does not basically affect the dimensions of the problem. Moreover, it would not be pertinent to other hypotheticals that could be put—for example, the use of government funds to pay the salaries of clerics, to support existing religious structures, etc. In strict logic, the issue of standing remains separate, preliminary, and unchanged throughout, though it is fair to recognize that some non-logical nerve may tingle when the stark proposition is put that concededly unlawful or unconstitutional action is in effect immune from judicial scrutiny. Cf. *Harmon v. Brucker*, 355 U. S. 579 (1958); *Leedom v. Kyne*, 358 U. S. 184 (1958).

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him, *Baker v. Carr*, *supra*, at 208, when he alleges that a federal statute authorizes, or is being applied to grant, support for one or more religious establishments? "The touchstone * * * is injury to a legally protected right * * *." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 140-41 (1951) (opinion of Burton, J., joined by Douglas, J.). The asserted right "may be based on an interest created by the Constitution or a statute." *Id.* at 152 (Frankfurter, J., concurring); see also *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 64 n. 6 (1963); *Alabama Power Co. v. Ickes*, 302 U. S. 464, 475, 478-79 (1938).

Another, more recent, and obviously pertinent formulation of the concept is this: "Have the [plaintiffs] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing." *Baker v. Carr*, *supra*, at 204.

Appraising the substantive character of the wrong asserted in the complaint in light of the foregoing definitions, it seems reasonably clear to me that plaintiffs have standing to maintain this suit. They allege the vividly personal, vital, intimate, and grave hurt against which the Establishment Clause was meant to guard. And unless they can sue to redress this kind of grievance, the first of the "preferred freedoms" safeguarded by the First Amendment is substantially unenforceable against federal violations, to which the amendment was initially, and for a long time exclusively, directed.⁵

5. The Establishment Clause is literally the first one in the First Amendment. It may be acknowledged in passing that this does not elevate it above the rest of the Article. See *Prince v. Massachusetts*, 321 U. S. 158, 164 (1944). The point approaches pedantry, however; it should be enough to note the familiar principle that the whole of the First Amendment occupies a "preferred position" (*id.* at 164, 167) in our constitutional firmament and is most notably and singularly in the domain of the personal liberties entitled to judicial protection.

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1. *The Establishment Clause forbids the use of tax money support any religion, and confers an enforceable "right" upon the federal taxpayer claiming this basic protection.*⁶

It is now familiar to all who have touched this subject that a central concern—perhaps the most central concern—of the Establishment Clause is to ban utterly the use of public moneys to support any religion or all religions. The history is reviewed in *Everson v. Board of Education*, 330 U. S. 1 (1947), and there is no reason to repeat at length what the Supreme Court has said there and elsewhere. It is sufficient to recall that both the majority and the dissenters in that case recognized, affirmed, and undertook to apply the vital First Amendment principle forbidding the "support" of churches through the exaction of "taxes and tithes." See, e.g., 330 U. S. at 8, 9, 10, 11; *id.* at 21, 22, 24, 26 (Jackson, J., dissenting); *id.* at 32, 33, 36-37, 40-41, 43, 44-45 (Rutledge, J., dissenting).⁷

6. This dissent is confined to the proposition that plaintiffs have standing to assert their claim under the Establishment Clause. As the complaint now stands, it seems unlikely that they could also demonstrate standing under the Free Exercise Clause, on which they also count. See *McGowan v. Maryland*, 366 U. S. 420, 429-30 (1961). While it probably makes no practical difference, if my views had prevailed, decision of the latter question could have been postponed until the court had a full record on the merits of plaintiffs' claims, possibly including some pertinent amendments to the complaint to conform to what might ultimately be proved.

7. The fullest account of the point is in the dissent of Mr. Justice Rutledge, who printed as an Appendix Madison's *Memorial and Remonstrance against Religious Assessments* of 1785, 330 U. S. at 63 *et seq.* Although in dissent, what Mr. Justice Rutledge wrote and collected there has continued to be cited by the Court to reflect the agreed understanding of the evils that generated, and were meant to be proscribed by, the Establishment Clause. See, e.g., *Abington School District v. Schempp*, 374 U. S. 203, 218-19 (1963); *Torcaso v. Watkins*, 367 U. S. 488, 492 n.7, 493 (1961); *McCullum v. Board of Education*, 333 U. S. 203, 210 notes 6 and 7 (1948).

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“ * * * The imposition of taxes to pay ministers’ salaries and to build and maintain churches and church property aroused their indignation. * * * It was these feelings which found expression in the First Amendment. * * * Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulous and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.” *Id.* at 11.

Following the quoted passage, the Court traced the “dramatic climax in Virginia in 1785-86,” the collaborative struggles of Jefferson and Madison, the latter’s famous Remonstrance, and the resulting “Virginia Bill for Religious Liberty,” with its ban against enforced public support of any church or religion. *Id.* at 11-13. And it reaffirmed (*id.* at 13) “that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.”

“Support” by the use of taxpayers’ money lay at the heart of Jefferson’s and Madison’s concern. Madison’s Remonstrance, “an event basic in the history of religious liberty,” *McCullum v. Board of Education*, *supra*, 333 U. S. at 214 (Frankfurter, J., concurring), was written, after all, to denounce proposed “religious assessments”—and indeed, assessments to be used for “support to religious education.” *Ibid.* In that historic document he argued suc-

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cessfully, and led to the First Amendment's assurance, that no federal official should be empowered to "force a citizen to contribute three pence only of his property for the support of any one establishment * * *." 330 U. S. at 65-66. To allow even such trivial exactions, he wrote, would empower the official to force the citizen "to conform to any other establishment in all cases whatsoever * * *." *Id.* at 66. And so it was essential "to take alarm at the first experiment on our liberties" (*id.* at 65)—to strike, as had the "freemen of America," before usurpation had become habit "and entangled the question in precedents." *Ibid.*

The assorted wrong, if the Establishment Clause has been violated, is for every unwilling contributor the very kind of "support" against which the Amendment was directed. "The matter is not one of quantity, to be measured by the amount of money expended." *Everson, supra*, at 63 (Rutledge, J., dissenting). The separation must be "complete and unequivocal," *Zorach v. Clauson*, 343 U. S. 306, 312 (1952); the "slightest breach" is to be resisted. *Everson, supra*, at 18. If there is "support," as plaintiffs here allege, then the "wall of separation" has been breached, and the evil denounced by the First Amendment has been realized.

But why the separation? Why the wall? Who, if anyone, is hurt by breaches? What is the nature of the hurt?

These questions, which ask about "standing," find recent responses in *Engel v. Vitale*, 370 U. S. 421 (1962), where the Court recalled what the Framers had learned in their blood about the meaning of "establishment." It said, in passages pertinent here (*id.* at 430-33, emphasis added):

"* * * The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether these laws operate directly to coerce non-

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observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. *When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.* * * * Another purpose of the Establishment Clause rested upon an awareness of the historical fact that *governmentally established religions and religious persecutions go hand and hand.* * * * The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind * * * —a law which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions of people like John Bunyan who persisted in holding ‘unlawful (religious) meetings . . . to the great disturbance and distraction of the good subjects of this kingdom. . . .’ And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies. *It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion.*”

Those words describe the subject matter of this lawsuit, whether or not plaintiffs are right on the merits, so far as our issue of standing is concerned. We deal with what the

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Bill of Rights enshrines as the most sacred of things, the hearts and the spirits of men. The claim is that the plaintiffs' money is being used in an official program which is being conducted so as to violate the First Amendment's protection of these and other citizens against the danger of coercion, thought-control, and persecution.

If we wrote on an utterly clean slate, even the fact of tax payments might be immaterial. Our direct knowledge of tyranny ought to be fresh enough to teach that there may be, in the kind of wrong against which plaintiffs complain, immediate and personal assault sufficient to comprise "legal injury." Even "novelty," after all, has not prevented the courts from recognizing "justiciability" within the framework of our constitutional scheme. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. *supra*, at 159 (Frankfurter, J., concurring). It should be no more difficult to identify an "injury," amounting to the beginnings of "coercion" and "persecution," so dramatically central in the concerns of those who wrote the First Amendment. It might be argued that the responsibly asserted grievance of anyone who felt the chill of threatened persecution is no less palpable a ground for standing than the complaint of a suitor who "chooses" to feel the spiritual blows struck by systems of racial segregation.⁸

8. It is now thirteen years since the erasure of the notion that racial discrimination could be deemed a "badge of inferiority * * * solely because the colored race chooses to put that construction upon it." *Plessy v. Ferguson*, 163 U. S. 527, 551 (1896), overruled in *Brown v. Board of Education*, 347 U. S. 483, 494-95 (1954). By now, surely, the courts have come to know that affronts to the spirit and conscience of men may be intensely genuine precisely because they are experienced as such. Thus, as Judge Soper said for the Fourth Circuit, in rejecting arguments reminiscent of the *Plessy* era: "We must give first place to the rights of the individual citizen, and when and where he seeks only equality of treatment before the law, his suit must prevail. It is for him to decide in which direction his advantage lies." *McKissick v. Carmichael*, 187 F.2d 949, 954, *cert. denied*, 341 U. S. 951 (1951).

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But there is no need to reach that far. The subject is one on which volumes of history outweigh any new pages of logic we might essay at this date. It is enough, I think, that the injury asserted by the taxpayer is at the core of the right enthroned by the First Amendment. Asserting the right in its pristine form, plaintiffs are entitled to have their claim heard.

2. *A federal taxpayer should be accorded the same standing under the First Amendment as is accorded state taxpayers under Everson.*

After sketching the historical background of the First Amendment, the Court in *Everson* stated what it then, and has since, deemed the governing substantive principles (330 U. S. at 15-16):

“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state.’ *Reynolds v. United States*, *supra* at 164.”

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Applying those principles, the Court rejected (5-4) the claim of the plaintiff taxpayer that the First Amendment—there, via the Fourteenth—forbade reimbursement of parents for the bus transportation of their children to sectarian schools. But the critical points of that decision for us are not, at this stage, in the particular result on the merits. There are two beacons in the case and its aftermath that ought to guide us to our conclusion on today's question of standing:

(1) The unanimity of the Court on the proposition that the Establishment Clause forbids support of any religion from the public treasury—i.e., that the “right” protected makes it a “legal injury” to have one's money taken and used for the proscribed purpose.

(2) The fact that no doubt was suggested concerning the standing of the complaining taxpayer, in the highest Federal Court as well as in the State's courts. While the question was not discussed in *Everson*, it has since become clear that the taxpayer was properly, if tacitly, accorded such standing. See *Doremus v. Board of Education*, 342 U. S. 429, 434 (1952).

This second point is the decisive one. There is no basis in principle or reason for allowing a state taxpayer to attack a “law respecting an establishment of religion” while denying the same right to a federal taxpayer opposing intrusion into the forbidden area by the Federal Government, the power of which remains more fearsome today, as it was when it comprised the exclusive concern of the Framers.

Everson started, of course, as the familiar form of state taxpayer's suit, subject at the state level to state notions about standing. However, to be heard on the merits in the Supreme Court, as he was, the appellant was required to show standing in the federal sense. If this was unclear at

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the time of *Everson*, it was made clear in *Doremus v. Board of Education*, *supra*, 342 U. S. at 434-35, where failure to show the "requisite financial interest" led to dismissal of the appeal because of the "case or controversy" requirement in Article III of the Federal Constitution. And it seems to be clear still that standing at any level of the federal system "is, of course, a question of federal law." *Baker v. Carr*, *supra*, 369 U. S. at 204.⁹

Nobody has suggested that the standing accorded in *Everson*, as thus explicated, is any less clear today for a state taxpayer. That continued position supplies, in my judgment, positive and substantially square ground on which standing should be found here.

The prime point—that Article III applies indifferently to both situations—has been noted already. What else is there? In *Doremus*, the Court said *Everson* had shown "a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of." 342 U. S. at 434. I do not find, at least in the *Everson* opinion, any precise "measurement" of plaintiff's tax burden. There is no suggestion whether plaintiff there had identified a nickel or a dollar or a thousand dollars of his spent for "the activities complained of."

All that was evidently meant was that the incremental money value of the time spent on the bible-reading assailed in *Doremus* was not practically "measurable" to the extent possible with respect to the reimbursed bus fares in *Everson*. And it may well have been significant that plaintiffs in *Doremus*, unlike the plaintiffs here, did not allege in their complaint any specific "appropriation or disbursement"

9. This does not require us to explore in a case begun in federal court the interesting thought, thus far not accepted in the Supreme Court, that "standing to raise a federal constitutional question" should be treated as being "itself a federal question, so that it will be decided uniformly throughout the country." Paul Freund in Cahn (ed.), *Supreme Court and Supreme Law* 35 (1954).

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of public funds for the bible-reading. No such obstacles exist here. The complaint is rested squarely upon alleged expenditures said to violate the Establishment Clause. If measurement is wanted in this age of computers, it can surely be had. We have only a complaint and a motion to dismiss before us. We do not know how rich the plaintiffs are or how much they pay in taxes. We do not know the size of the expenditures of which they complain. It may be that they can show measurably larger financial stakes than those of the taxpayer in *Everson*. All of this is surely knowable if anyone cares, and its omission from our barren record at this time would not in itself justify dismissal now.

I would submit, however, that measurements of this sort could hardly have been declared vital for a First Amendment claim, whatever else the quoted language of *Doremus* may have meant. While the complaint charges unconstitutional expenditures, the claimed injury relates to familiar "consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." *McCullum v. Board of Education*, *supra*, 333 U. S. at 228 (Frankfurter, J., concurring).

It was also said in *Doremus* (342 U. S. at 435) that the appellants showed "no such direct and particular financial interest" as to ground the kind of standing allowed in *Everson*. In their context, those words would appear to have referred again to the fact that the plaintiffs made no allegation that any added tax moneys were being expended for bible-reading. That pleading deficiency, as I have just noted, does not exist here. Nevertheless, there has been some suggestion in the argument before us that plaintiffs might well have a right to sue if there were a specific fed-

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eral tax, separately assessed and collected, for the use they claim is forbidden. But this borders on the frivolous. The First Amendment's commands, so sensitively and astutely enforced in their essential substance under the decisions of the Supreme Court, would be trivialized if they could be avoided by details of government bookkeeping or fiscal regulation. "What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." *Abington School District v. Schempp*, *supra*, 374 U. S. at 230 (Douglas, J., concurring).

It seems perfectly obvious that those who wrote the First Amendment would have been astonished by the suggestion that it might come to be enforceable *only* against the States and not against the Federal Government. The familiar words are that "*Congress shall make no law respecting an establishment of religion * * **". When they were written, they were applicable only to the Federal Government, and they remained so confined until just a generation ago.¹⁰ It was the national power that the Founders feared and undertook to curb. See *McGowan v. Maryland*, *supra*, 366 U. S. at 440-42; *Everson v. Board of Education*, *supra*, 330 U. S. at 13; Freund, "The Legal Issue," in *Religion and the Public Schools*, 4, 8-9 (1965). Indeed, when they fashioned the Bill of Rights, established churches were still, if not for long, familiar in the States, and it was

10. It was not settled plainly until *Cantwell v. Connecticut*, 310 U. S. 296 (1940), that the clauses here in question applied to the States under the Fourteenth Amendment, although there had been a broad intimation of this in 1923, in the volume that contains *Frothingham v. Mellon*. *Meyer v. Nebraska*, 262 U. S. 390, 399. See *Abington School District v. Schempp*, *supra*, 374 U. S. at 253-54 (Brennan, J., concurring). While it is ancient history now, it is of passing interest to recall that there were efforts after adoption of the Fourteenth Amendment to enact a specific amendment forbidding support of religion and insuring free exercise in the States. See *id.* at 256-58.

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clear that the First Amendment left that situation untouched. See *McGowan v. Maryland*, *supra*, 366 U. S. at 486. (Frankfurter, J., concurring); *Abington School District v. Schempp*, *supra*, 374 U. S. at 214 n.5.

There is no question now, of course, that the First Amendment applies with full force to the States. But it is a ludicrous anomaly to close the circle, as the majority opinion does, by making at least the Establishment Clause a substantial nullity with respect to the Federal Government. See Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1310-11 (1961). The Supreme Court has never faced, let alone ordered, this historically and logically unacceptable paradox. Until or unless it does, and while the unanimously accepted principles of *Everson* stand, I would allow suits like the one plaintiffs have brought.

3. *The fact that, as a practical matter, only plaintiffs like the ones here can sue is in itself a ground for their standing.*

The rules on standing, tied to fundamental premises governing the role of courts in our system, have been evolved judicially over the years, and continue to evolve, to fit the needs of a living Constitution. The rules are not, and in their nature cannot be, mechanical generalities. "[T]he concept of standing is a necessarily flexible one, designed principally to ensure that the plaintiffs have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions * * *.'" *Abington School District v. Schempp*, *supra*, 374 U. S. at 267 n.30 (Brennan, J., concurring, and quoting from his opinion for the Court in *Baker v. Carr*, *supra*, 369 U. S. at

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204).¹¹ If this idea of flexibility means anything, it means that refined judgments must be made upon the nature of the interests at stake, the appropriate functions of judges with respect to such interests, and the practical consequences in our constitutional scheme of granting or denying standing in any particular case.

And so, when we deal with the subject of First Amendment freedoms, it is essential to start by recognizing (as Mr. Justice Brennan did in the passage quoted above) that it has fallen to the courts in our system to perform "the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century * * *." *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 639 (1943). In discharging this responsibility in cases under the First Amendment, the highest Court has observed more than once that effective enforcement of the "delicate and vulnerable, as well as supremely precious" rights at stake (*N.A.A.C.P. v. Button*, 371 U. S. 415, 433 (1963)) may require exceptions "to the usual rules governing standing * * *." *Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965); see also *United States v. Raines*, 362 U. S. 17, 22 (1960); *Freedman v. Maryland*, 380 U. S. 51, 56-57 (1965).

11. I have used earlier the quoted language from *Baker v. Carr* concerning this need for "concrete adverseness." The thought was not further elaborated in *Baker v. Carr*, and did not have to be. Similarly here, there has not been any suggestion that the suit is not genuine, robustly adverse, and likely to be fought on the kind of sharp and thorough presentation the courts must have for problems of such moment. The briefs already before us reflect this. We are perhaps entitled to notice that plaintiffs' lead counsel has authored or co-authored substantial volumes on the subject of the litigation. See Pfeffer, *Church, State and Freedom* (rev. ed. 1967); Stokes and Pfeffer, *Church and State in the United States* (1964). There is, in a word, clear fulfillment of the practical criteria formulated by Mr. Justice Brennan, and followed by the Court in *Baker v. Carr*.

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One such exception, highly pertinent here, is the idea that where asserted violations of the First Amendment are in issue, a particular plaintiff or class of plaintiffs may be found to have standing because to deny it "might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment—even though no special monetary injury could be shown." *Abington School District v. Schempp, supra*, 374 U. S. at 266 n.30 (Brennan, J., concurring); see also *Bantam Books, Inc. v. Sullivan, supra*, 372 U. S. at 64-65 n.6; *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 459 (1958); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

It is not the law generally, of course, that *someone* must have standing to bring alleged violations of the Constitution to court. On the contrary, to go no farther than the still vital teachings of *Frothingham v. Mellon*, it is clear that there are areas of the law where nobody has such standing. But it will be found upon analysis that in such cases, whether expressly or not, the crux of the matter is that the subject is one confided to the final authority of branches other than the judiciary—that the cases are, to categorize them more precisely, non-justiciable. See, generally, *Baker v. Carr, supra*, 369 U. S. at 208 *et seq.* This, I submit, is the sufficient ground for cases like *Pauling v. McElroy*, 278 F.2d 252 (D. C. Cir.), *cert. denied*, 364 U. S. 835 (1960) and *Pauling v. McNamara*, 331 F.2d 796 (D. C. Cir. 1963), *cert. denied*, 377 U. S. 933 (1964), cited by defendants, where the plaintiffs sought to enjoin nuclear testing.

Whatever may be said about nuclear testing, declarations of war and peace, and other matters confided primarily or exclusively to the "political" departments, the subject of the First Amendment is a quite different one. The high promises of that Amendment, as the years have unfolded them and given them meaning, are peculiarly for the courts to enforce. As the Court said in *West Virginia*

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State Board of Education v. Barnette, supra, 319 U. S. at 638:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

See also *Thomas v. Collins*, 323 U. S. 516, 529-30 (1945); *United States v. C.I.O.*, 335 U. S. 106, 139-40 (1948) (Rutledge, J., concurring); *United States v. Carolene Products Co.*, 304 U. S. 144; 152 n.4 (1938).

Where, as in this case, it is substantially conceded that only people like the plaintiffs before the court can complain as a practical matter, this is in itself weighty reason for doubting that notions of "standing" imported from wholly alien contexts should serve to make lifeless slogans of basic liberties.

4. *Doubts about the merits must not obscure or impair the place of the First Amendment as a barrier against the "first experiment on our liberties."*

Elaborating on the discussion under the preceding heading, I venture to suggest again (see note 4, *supra*) that this decision might be going the other way if plaintiffs were asserting a patent violation of the Establishment Clause—the building of churches with federal money, payment of clerical salaries, or other unthinkable measures of some similar nature. While we are together in eschewing any in-

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timation on the merits, I think it permissible to say that plaintiffs' claim obviously falls short of any such plainly demonstrable breach. (Compare the 4-3 decision of the New York Court of Appeals on June 1, 1967, in *Board of Education of Central School District No. 1 v. Allen*, — N.Y.2d —, upholding state loans of textbooks to parochial as well as public school children.) But I think it bears special emphasis, however a later decision might distinguish what is done today, that there is no principal difference between this case and the unimaginable ones I have hypothesized.

The emphasis is fair, I think, for several reasons. First, it makes vivid the sweeping extent to which this decision on standing nullifies the Establishment Clause as a judicially enforceable protection against federal action. Similarly, it helps to demonstrate the discordance between this ruling and the deep concerns of those who gave us the First Amendment. The Founders, it is pertinent to recall again, were zealous to guard against even minute approaches to the problems of established religions that were so immediate and acute for them. They wrote with deliberate sweep not merely against laws establishing a church or religion, but against any "law respecting" that form of official coercion. See *McGowan v. Maryland*, *supra*, 366 U. S. at 441-42. The Supreme Court has enforced the broad prohibition with rigor. It has allowed no leeway for practices that "may be relatively minor encroachments on the First Amendment." *Abington School District v. Schempp*, *supra*, 374 U. S. at 225. For, as the Court has said (*ibid.*): "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" See also *Engel v. Vitale*, *supra*, 370 U. S. at 436, *Thomas v. Collins*, *supra*, 323 U. S. at 530.

That fundamental approach should move us on the problem. A decision refusing to hear a case where there may be

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only "minor encroachments" or no encroachments at all could come to be a plague in the perhaps unlikely, but possible, case of broader assaults upon the wall of separation. The time to make clear the scope of the protection is at the earliest moment, not when controversy may become or has become exacerbated by "the anguish, hardship and bitter strife" with which the history of this subject is so painfully filled. *Engel v. Vitale, supra*, at 429. To recall again the compelling thoughts of Madison's Remonstrance, it is our duty to maintain the protection in its full, unfettered vigor, and to see that it never becomes "entangled * * * in precedents" that may weaken or choke it. *Everson v. Board of Education, supra*, 330 U. S. at 65.

Concepts of standing have been adapted in our time to safeguard interests far less dear than those assessed in this case. The Congress, with the approval of the Supreme Court, has allowed review of official action in matters of economic regulation at the instance of "private litigants [who] have standing only as representatives of the public interest." *Scripps-Howard Radio v. Federal Communications Commission*, 316 U. S. 4, 14 (1942). We have witnessed the increasing appearances and ready acceptance of suitors attacking official action in the role of Judge Frank identified as that of "private Attorney Generals." *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated and remanded*, 320 U. S. 707 (1943).¹²

12. A word may be said at this point about the Government's fleeting observation that the Senate has passed a bill (S. 3, 90th Cong., 1st Sess. (1967) which would provide for the standing plaintiffs seek in this case. The Senate has voted other such bills in the past. See S. 2097, 89th Cong., 2d Sess. (1966); H.R. 4163, 88th Cong., 1st Sess. (1963) as amended in the Senate, 109 Cong. Rec. 19357, 19891 (1963), the amendment, however, being later deleted in conference. The bills, and the discussion about them, are interesting in their reflection of how accepted it has become that the authoritative construction of the First Amendment must be sought from the Supreme Court. What I urge here is simply that there is no need for the courts to await such legislation before exercising this familiar, generally agreed, and central item of their responsibilities.

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It is strange, I think, for the courts to be more niggardly in defining standing before them for litigants asserting the most basic and urgent of occasions for judicial protection. If this incongruous sort of abstention is proper, it can only be because it is thought to be required by canons of judicial self-restraint that are so wise and so essential in their place. In my understanding of the First Amendment, as the Supreme Court has enforced it, those canons have no place here.

II

Contrary to the majority, I believe that *Frothingham v. Mellon*, 262 U. S. 447 (1923) neither requires nor justifies the conclusion that plaintiffs lack standing in this case. In that lawsuit—decided, incidentally, before any of the great cases that have given the First Amendment the meaning we know today—Mrs. Frothingham sought to challenge the constitutionality of the Maternity Act of November 23, 1921. She sued as “a citizen of the United States and of the State of Massachusetts,” and as “a taxpayer of the United States.”¹³ She did not claim or suggest that the Maternity Act as such had any impact upon her or upon any specific rights of hers assertedly protected by the Federal Constitution. Instead, her claim was that the statute was beyond the powers of Congress; that it invaded the powers reserved to the States by the Tenth Amendment; that the financial burdens of it fell unequally upon the States; that “her constitutional rights to have taxes levied and asserted against her by the United States for those purposes alone for which the Constitution of the United States provides and to have the taxes paid by her to the United States appropriated by the Congress of the United States in the manner provided by the Constitution * * *

13. Complaint, par. I, in the Supreme Court Record, *Frothingham v. Mellon*, Oct. Term 1922, No. 962, p. 2.

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[had] been infringed and violated;”¹⁴ and that the effect of all this was to deprive her of her property without due process of law.

That was the case, said to be controlling here, in which the Supreme Court denied Mrs. Frothingham’s standing as a taxpayer. I shall review just below the reasons given for that result in Mr. Justice Sutherland’s opinion for the Court, and attempt to show why those reasons have little or no application to the present problem. First, however, it may profit to look at the matter broadly and observe what I perceive as obviously decisive differences between the cases.

What Mrs. Frothingham claimed in an action that seems on its face so absurd today was nothing less than a roving commission, based upon her status as taxpayer, to have an adjudication concerning the validity of any appropriation of money by the Congress. This meant in effect that she or any taxpayer, solely as taxpayer, would be entitled to review of practically any federal statute, since it is always—or, at least almost always—the case that appropriations are discernible as the energizing force behind official action. The Maternity Act did not touch any of Mrs. Frothingham’s supposed rights, and she made no claim that it did. In a word, as Mr. Justice Harlan indicated for the Supreme Court just the other day, *Frothingham v. Mellon*, read without forgetting what it was about, stands for the scarcely debatable proposition “that a possible financial loss is not *by itself* a sufficient interest to sustain a judicial challenge to governmental action.” *Abbott Laboratories v. Gardner*, — U. S. —, — (1967) (emphasis added).

The case before us differs sharply from Mrs. Frothingham’s on the question of standing just as (and, indeed, because) it differs in the nature of the substantive interests involved. The taxpayers here claim no general right as

14. *Id.*, par. III (h); Record, p. 6.

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taxpayers to review federal action. What they invoke is the specific right, defined broadly but certainly by the Establishment Clause, to be free of any "tax in any amount, large or small, * * * levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson v. Board of Education*, *supra*, 330 U. S. at 16. As was not the case for Mrs. Frothingham, the substance of the statute in issue is for the plaintiffs before us the very heart of the matter. Of course, the essence of their asserted right is bound up, as it was for Madison and his colleagues in the framing of the First Amendment, with the forbidden use of public moneys to support religious establishments. But there is nothing here resembling a claim like Mrs. Frothingham's to a general right of review over appropriations. While it centers on the use of funds, plaintiffs' suit seeks the particularized and intimately personal protection of the First Amendment from the kind of "coercion," "compulsion," and at least threatened "persecution" against which the Establishment Clause was meant to guard.

In sum, to use the words of another opinion for the Court by Mr. Justice Sutherland (citing *Frothingham*), Mrs. Frothingham's case failed because she asserted "no legal or equitable right" eligible for judicial protection, "no such interest and * * * no such legal injury" as the courts are constituted to redress. *Alabama Power Co. v. Ickes*, *supra*, 302 U. S. at 475, 478. The plaintiffs here, on the other hand, invoke a clear and "specific limitation," *Gomillion v. Lightfoot*, 364 U. S. 339, 343 (1960); they assert now familiar "legal rights" given by the Establishment Clause; they allege a "personal stake" and "an interest of their own" no less clear and no less justiciable than the one in *Baker v. Carr*, *supra*, 369 U. S. at 204, 207, from which the quoted phrases come; they present a case

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that is not merely in "the conventional sphere of constitutional litigation," *Gomillion v. Lightfoot*, *supra*, at 347, but one entitled to the "close scrutiny demanded . . . when First Amendment Liberties are at issue . . ." *McGowan v. Maryland*, *supra*, 366 U. S. at 449.

I have sought in the two preceding paragraphs to state what seems to me to be the dispositive difference between this case and *Frothingham*. When we turn to the reasons given in the Court's opinion for rejecting Mrs. Frothingham's suit, the difference remains clear and undiminished.

1. In disposing of *Frothingham*, the Court began by distinguishing the case from the traditional form of taxpayer's action against a municipality. The municipal taxpayer, the Court said (262 U. S. at 486), has a "direct and immediate" interest in municipal expenditures, the relationship being (p. 487) "not without some resemblance to that subsisting between stockholder and private corporation." But the taxpayer's interest in the national fisc "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Ibid*.

The quoted passages have been said to be outdated by the vastly increased impact of federal taxes and the correspondingly less "minute" share at least some taxpayers might claim in the federal as compared to municipal treasuries. 3 Davis, *Administrative Law Treatises* 244 (1958). But I do not stop to consider or to weigh such criticism against the unaltered position of the Supreme Court. It is quite enough for this case to repeat that plaintiffs' suit does not resemble the traditional taxpayer's suit or Mrs. Frothingham's, where the gravamen of the supposed right is nothing more than "a possible financial loss . . . by

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itself" from allegedly improper expenditures. *Abbott Laboratories v. Gardner, supra*, — U. S. at —. Here, the crux of the interest is found in the First Amendment, not in the supposed loss of money as such. And so it is of no moment that the amount may be "minute," that it may be in modern currency the equivalent of as little as "three pence." Cf. *Thompson v. City of Louisville*, 362 U. S. 199, 203-204 (1960). Nor is it important, whether true or not, that the amount may be to some extent "indeterminable." Nobody stopped to make the computation in *Everson* any more than the Court thought it necessary in *Baker v. Carr* for the plaintiffs to quantify the "debasement of their votes" (369 U. S. at 188, 194) in which inhered the asserted injury that gave them standing.

To hold, as I would, that plaintiffs like the ones here should be heard on their First Amendment claims would not lower in any meaningful sense the barrier against standard "taxpayers' suits" emplaced by *Frothingham*. Nobody could infer from such a holding any supposed right to roam at large as a taxpayer and test impersonally the validity of any and every federal appropriation. There may be other personal interests like the one given by the Establishment Clause where a sharply identified and cherished liberty is infringed by the uses of federal funds. If so, these would be, as they should be, bases for standing in the federal court. The vital point remains that the present case, where such an interest is urged, differs on this ground from the generalized power of supervision claimed for the taxpayer in *Frothingham*.

2. Expanding upon its reasons for denying any general right of review for the federal taxpayer, the Court said in *Frothingham* (at 487):

"* * * If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the

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same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned."

That language does not state a ground separate from the one I have just considered, but it commands respectful attention. Read in its context, as it must be, it adds nothing to the barrier found by the majority against the suit of the present plaintiffs.

The fact that many people may share, and might sue upon, a justiciable constitutional right has never been supposed to present in itself an obstacle to suit by any of them. Cf. *Brown v. Board of Education*, 347 U. S. 483 (1954); *Baker v. Carr*, *supra*; *Seward Machine Co. v. Davis*, 301 U. S. 548 (1937). The federal courts are open, even in the face of threatened inundation, where rights far less precious are in issue.¹⁵ And we know in this time of class actions and huge litigations generally that the problem is manageable.

For a case like the present one, there is no substantial problem whatever. There may unquestionably be other actions of the same kind. In the end, however, there is likely to be only a single hearing and decision by the Supreme Court. *Stare decisis*—and, before that, the powers of the lower courts to stay or consolidate redundant actions—will dispose of the matter with only the customary strain of adjudication for which courts sit.

3. Undoubtedly central in *Frothingham* was the principle of the separation of powers. See 262 U. S. at 488-89. This important aspect of the opinion turns, however, on

15. Compare the recent electrical equipment avalanche, and one of the many discussions of it in the Third Circuit Judicial Conference of last year, 39 F.R.D. 495 *et seq.*

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considerations no different from those I have already discussed. Here, again, the vice found in Mrs. Frothingham's case was its premise that any and every action involving appropriations should automatically be reviewable at the instance of a taxpayer. It was that untenable theory to which the Court responded when it said (p. 488):

"* * * We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act."

The test thus stated, for the reasons I have urged, is met by the plaintiffs in this case.

Of course, the delicate power of judicial review inevitably starts echoes of the separation of powers. And there are broad classes of cases, "presenting [no] justiciable issue," where the power is absent. See *Baker v. Carr*, *supra*, 369 U. S. at 208 *et seq.* But this is not such a case. We have here "a judicial controversy" (*Frothingham* at 489) concerning a "right" most notably and centrally "within the reach of judicial protection * * *." *Baker v. Carr*, *supra*, at 237. It should be decided on its merits.

If we were free to be concerned about the comfort of judges, there would be much to say for abstention from a subject so fraught with passions that have generated many bloody chapters of history. No one can read the relevant pages of the Supreme Court reports without knowing the travail it has cost to keep alive and intact the uncompromising principle of separation for which Madison and Jefferson fought. But apart from the fact that judges' case is not our subject, there is consolation of high achievement in the enterprise. Accepting cases concerned arguably with

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the most "negligible" of alleged breaches, the Supreme Court has labored to keep the wall of separation in sound repair. That, in history's long view, is the real gain of *Everson* and the whole body of decisions. The close divisions on the Court have not reflected anything short of essential unanimity on the principle. They have shown only that in this area of profound values, where the claims of religion and conscience must be weighed against charges of official trespass, it may be agonizing work to identify "the first experiment on our liberties."

The work has gone forward in a nearly miraculous environment of reasoned and orderly deliberation. The Court has, of course, been subjected to outpourings of the Vitriol it has zealously allowed under the First Amendment. But in a nation of diversities both rich and potentially disintegrating, the domains of Church and State have lived apart and in peace. In this achievement, I think, the willingness of the Supreme Court to hear and resolve claims of incipient breaches must surely be viewed as a major factor. True religion and free conscience generally have flourished with the Court's steady enforcement of the "principle. . . . that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel v. Vitale, supra*, 370 U. S. at 432.

Today's decision disservices that principle.

Marvin E. Frankel

June 19, 1967

U.S.D.J.

**Notice of Appeal to the Supreme Court
of the United States**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 4102

**FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,**

Plaintiffs,

against

**JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,**

Defendants.

I. NOTICE IS HEREBY GIVEN that the appellants herein hereby appeal to the Supreme Court of the United States from a final order of the United States District Court for the Southern District of New York, dated June 19, 1967, dismissing the herein complaint. This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in the transcript the following:

- 1) The complaint filed with the Clerk of this Court on December 1, 1966.

*Notice of Appeal to the Supreme Court
of the United States*

2) Notice of motion of the defendants to dismiss the complaint, filed February 20, 1967.

3) Notice of motion of the plaintiffs to convene a three-judge court, filed April 12, 1967.

4) The order and opinion of Hon. Marvin E. Frankel, United States District Judge for the Southern District of New York, dated April 27, 1967, granting the plaintiffs' motion to convene a three-judge court and referring to said court the defendants' motion to dismiss.

5) Order dated April 28, 1967 of Hon. J. Edward Lumbard, Chief Judge of the United States Court of Appeals for the Second Circuit, designating Hon. Paul R. Hays, Circuit Judge, Hon. John F. X. McGohey, United States District Judge, and Hon. Marvin E. Frankel, United States District Judge, to herein determine the within case.

6) The order of the United States District Court, filed June 19, 1967, dismissing the complaint in this case, together with the opinions of Circuit Judge Hays and District Judge Frankel.

III. The following question is presented by this appeal:

Do the plaintiffs have standing to bring this action to enjoin the defendants from using Federal funds to finance guidance services and instruction in reading, arithmetic and other subjects, in religiously operated schools, and to prevent the expenditure of Federal funds for the purchase of textbooks and other instructional materials for use in such schools?

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Supreme Court of the United States

October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Appellees.

JURISDICTIONAL STATEMENT

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| School District of Abington Township v. Schempp, 374 U. S. 203 (1963), quoting West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943) | 8, 9 |
| Washington v. Texas, 35 L.W. 4675 (1967) | 7-8 |
| Wieman v. Updegraff, 344 U. S. 183 (1952) | 9 |

Other Authorities:

| | |
|--|---------------|
| Elementary and Secondary Education Act of 1965, Titles I and II | 2, 3, 4, 5 |
| Public Law 89-10, 64 Stat. 1100 | 2 |
| 20 U.S.C. Sections 241a-1, 821-27 (Supp. I, 1965) | 2 |
| 28 U.S.C. Section 1253 | 1 |
| Section 2282 | 2 |
| Section 2284 | 2 |
| United States Constitution First Amendment | 3, 4, 5, 8, 9 |
| Fourteenth Amendment | 7, 8 |

IN THE
Supreme Court of the United States

October Term, 1967

No.

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Appellees.

JURISDICTIONAL STATEMENT

Appellants appeal from a final order of the United States District Court for the Southern District of New York, dated June 19, 1967, dismissing the complaint herein. This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

Appellants brought this action to enjoin the defendants from using Federal funds to finance guidance services and

instruction in reading, writing and other subjects in religiously operated schools, and to prevent the expenditure of Federal funds for the purchase of textbooks and other instructional materials for use in such schools. The complaint alleged that defendants have been and still are using Federal funds for these purposes in administering Titles I and II of the Elementary and Secondary Education Act of 1965, Public Law 89-10, 64 Stat. 1100, 20 U.S.C. secs. 241a-1, 821-27 (Supp. I, 1965). Appellants alleged that if these expenditures are authorized by the Act the statute to that extent constitutes a "law respecting an establishment of religion" and a law "prohibiting the free exercise thereof" in violation of the First Amendment to the Constitution of the United States. Defendants moved to dismiss the complaint on the ground that plaintiffs, as mere taxpayers and citizens, have no standing to bring this suit. The plaintiffs cross-moved to convene a three-judge court pursuant to 28 U.S.C. secs. 2282, 2284. The plaintiffs' motion was granted, a three-judge court was convened and the defendants' motion was referred to it. By a vote of 2 to 1, that court granted the defendants' motion and ordered dismissal of the complaint.

Opinions Below

The opinion on the motion to dismiss and on the motion to convene a three-judge court are as yet unreported. They are printed respectively in Appendix A (pp. 11-46) and Appendix B (pp. 47-55) of this Statement.

Jurisdiction

The appellants herein filed in the District Court their notice of appeal to this Court on June 26, 1967. The order of the District Court dated June 19, 1967 is in all respects final.

Statute Involved

The statutory provisions involved in this suit are Titles I and II of the Elementary and Secondary Education Act of 1965. They are printed in Appendix C to this Statement (pp. 56-77).

The Question Presented

This appeal presents a single question: Do citizens and taxpayers of the United States have standing to challenge in the Federal courts an expenditure of Federal funds on the ground that it is in violation of the Establishment and Free Exercise provisions of the First Amendment to the United States Constitution?

Statement of the Case

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the City and State of New York, challenging the constitutionality under the First Amendment of certain expenditures made by the Department of Health, Education and Welfare. The complaint, whose allegations must be pre-

sumed to be true for the purpose of this appeal, alleges that these expenditures, purportedly made pursuant to the authority of the Elementary and Secondary Education Act of 1965, were made to finance the furnishing of instruction and the providing of instructional materials for use in religious and sectarian schools. The plaintiffs requested judgment declaring these expenditures to be unconstitutional and enjoining further expenditures for these purposes. No request was made for judgment requiring restitution for funds already expended or which will have been expended before issuance of the injunction sought in the action.

The District Court dismissed the complaint on a single ground: that by reason of *Frothingham v. Mellon*, 262 U. S. 447. (1923), the plaintiffs had no standing to bring the action, that there was thus no justiciable controversy and that the court therefore lacked jurisdiction of the subject matter. The court rejected the plaintiffs' contentions that *Frothingham* was not based upon absence of constitutional jurisdiction but upon judicial policy and that the policy considerations which required dismissal in *Frothingham* were inapplicable to a suit based upon the First Amendment. The court likewise refused to agree with the plaintiffs' contention that the facts relating to standing presented in this case are identical with those in *Bradfield v. Roberts*, 175 U. S. 291 (1899), and that this Court's acceptance of jurisdiction in that case required the District Court to accept jurisdiction in this one. Finally, although conceding that *Frothingham* has been subject to criticism, the court held that it had never been overruled or limited by this Court and that accordingly its authority was unimpaired.

The Question Presented is Substantial

There can be little doubt that the question presented upon this appeal is one of national importance. It is important in its own right and additionally as a key to judicial resolution of a substantive question of major national importance—the constitutional application of the Elementary and Secondary Education Act of 1965.

The applicability of *Frothingham* to First Amendment suits as well as the continued authority of that case are issues which only this Court can determine. So, too, the extent, if any, to which the Federal funds allocated by the Elementary and Secondary Education Act of 1965 can constitutionally be used to support instruction in parochial schools is a question which only this Court can definitively determine. That such a determination is of national importance is indicated by the statement of the defendant, Harold Howe, United States Commissioner of Education, according to a news report in the *New York Times* of November 19, 1966, "that the courts would have to clarify what Federally financed services could be given to students of church-related schools" and that, "without court rulings * * * Federal and state education agencies will continue to have problems."

Nor can there be any doubt that the question presented in this appeal is substantial. As the majority of the court below conceded, *Frothingham* has been the subject of considerable criticism among constitutional authorities and its continued validity is at least doubtful. In any event, even if the authority of *Frothingham* is unimpaired, we submit

that the court below erred in holding that it applied to this case.

Although the court relied on *Frothingham*, which we believe is not in point, it disregarded *Bradfield v. Roberts*, 175 U. S. 291 (1899), which we submit is indistinguishable in respect to the jurisdictional issue. In *Bradfield*, a Federal taxpayer, a resident and citizen of the District of Columbia, sued the Treasurer of the United States to enjoin the payment of Federal funds to a hospital alleged to be sectarian, asserting that the appropriation, which had been made by Congress, violated his First Amendment rights.

That case and this are indistinguishable. In both, the funds came out of the general treasury of the United States, and were raised from taxes imposed upon all taxpayers in the United States, not merely local residents. In both, a municipal corporation was used as the means of transferring Federal funds to a sectarian institution; in *Bradfield* it was the District of Columbia, and in the present case, the Board of Education of the City of New York. In both, the suits were directed against the Federal Government, not against the local agency. The defendant in that case was the Treasurer of the United States; the defendants in this one, the Secretary of Health, Education and Welfare and the Commissioner of Education. In both cases, the defendants were represented by the Attorney General of the United States and, in both cases, the plaintiffs sued as citizens and taxpayers of the United States and as residents of the local area. We submit therefore that, just as the *Bradfield* case was heard on the merits, a similar result is required here.

It should also be noted that, subsequent to *Frothingham*, this Court heard and decided on the merits a taxpayer's suit challenging a grant of funds by the State of New Jersey for payment of parochial bus transportation. *Everson v. Board of Education*, 330 U. S. 1 (1947). Here again, although the Court did not advert to the question of standing, it was plain that it was prepared to act solely on the basis of a taxpayer's complaint.¹

If *Frothingham* were held to bar this suit involving Federal funds, while *Everson* allows just such a suit involving state funds, a truly anomalous situation would arise, as Judge Frankel pointed out in his dissenting opinion (*infra*, p. 32). The Constitution expressly forbids Congress from making a law respecting an establishment of religion. It imposes that limitation on the states only indirectly and by implication through the Fourteenth Amendment. It would be strange indeed if, in actual practice, Congress could make such a law but a state could not.

Moreover, denial of jurisdiction in the present case would go directly contrary to the clear policy of this Court to make uniform the judicial protection accorded to constitutional rights from Federal and state impairment. From *Gitlow v. New York*, 268 U. S. 652 (1925), to *Wash-*

1. *Doremus v. Board of Education*, 342 U. S. 429 (1952) is not inconsistent with the *Bradfield* and *Everson* cases. There, this Court dismissed an action to enjoin religious practices in the public schools. One plaintiff did not allege he had a child in the public schools, and the other plaintiff's child, who had been attending school when suit was begun, had graduated by the time the suit reached the Supreme Court. *Id.* at 432-33. Thus, the case was moot. Although the two plaintiffs also claimed the right to sue as taxpayers, they did not allege any expenditure of public funds, an obviously fatal defect in a taxpayer's suit. Obviously, an injunction suit against expenditures of funds cannot be entertained where there have been no expenditures.

ington v. Texas, 35 L.W. 4675 (1967), the clear thrust of this Court's decisions has been to make applicable to the states with equal vigor the limitations imposed upon the Federal Government by the Bill of Rights. Conversely, decisions such as *Hurd v. Hodge*, 334 U. S. 24 (1948), and *Bolling v. Sharpe*, 347 U. S. 497 (1954), indicated a similarly strong policy that the limitations imposed upon the states by the Fourteenth Amendment shall be applicable with equal vigor against the national government. Consistency with this policy, we submit, requires the Court either to overrule *Everson* or to hold that *Frothingham* does not bar the present suit.

It is no answer to suggest that resort can be had for relief to a different branch of government, specifically to Congress. Acceptance of that argument would require overruling *Marbury v. Madison*, 1 Cr. 137 (1803), for whenever the Court exercises its responsibility of judicial review it is implicitly finding that resort to Congress does not constitute an adequate or even meaningful remedy. Moreover, the argument is particularly inapposite in a First Amendment case. As this Court said in *School District of Abington Township v. Schempp*, 374 U. S. 203, 226 (1963), quoting *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638 (1943):

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental

rights may not be submitted to vote; they depend on the outcome of no elections.

We emphasize strongly, as this Court has done in all the establishment cases from *Everson* through *Schempp*, that the establishment of religion clause is as much a part of the First Amendment as is every other guarantee in that opening paragraph of our Bill of Rights. We urge, too, that this Court has never applied the *Frothingham* principle to a First Amendment case. On the contrary, its acceptance of jurisdiction in *Bradfield* and *Everson* indicates quite clearly that the *Frothingham* principle does not bar First Amendment cases generally or establishment cases particularly. Indeed, numerous cases decided by this Court indicate that the *Frothingham* principle was not intended to and will not be held to bar suits other than the substantive due process property right type of suit involved in that action, and which today would in any event be barred by the principle most recently reaffirmed in *Ferguson v. Skrupa*, 372 U. S. 726 (1963). See, e.g., *Engel v. Vitale*, 370 U. S. 421, 436 (1962); *Baker v. Carr*, 369 U. S. 186 (1962); *Heim v. McCall*, 239 U. S. 176 (1915); *Hawke v. Smith*, 253 U. S. 221 (1920); *Wieman v. Updegraff*, 344 U. S. 183 (1952); *Adler v. Board of Education*, 342 U. S. 485 (1952).

Conclusion

The Federal question presented by this appeal is substantial and of national importance. It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

LEO PFEFFER
Attorney for Appellants

JOSEPH B. ROBISON
DONALD M. KRESGE
Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 4102

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

*Plaintiffs,**v.*

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Defendants.

(Argued May 25, 1967)

Decided June 19, 1967)

Before:

Hays, Circuit Judge and McGohey and Frankel, Dis-
trict Judges.

Leo Pfeffer, New York, New York (Joseph B.
Robison and Donald M. Kresge, on the brief),
for Plaintiffs,

Arthur S. Olick (Robert M. Morgenthau, United
States Attorney for the Southern District of
New York, Michael D. Hess, Assistant U. S. At-
torney, on the brief), *for Defendants,*

Thomas F. Daly, New York, New York (Lord, Day
& Lord, Julius Berman, Reuben E. Gross and
Marcel Weber, on the brief), *for Proposed In-
tervenors.*

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HAYS, Circuit Judge:

This is an action to enjoin the defendants from using federal funds to finance guidance services and instruction in reading, arithmetic and other subjects in religiously operated schools, and to prevent the expenditure of federal funds for the purchase of textbooks and other instructional materials for use in such schools. It is alleged that defendants are using federal funds for these purposes in administering Titles I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§241 a-1, 821-27 (Supp. I, 1965).

Plaintiffs requested that a three-judge court be convened pursuant to 28 U.S.C. §2282, 2284 to consider their contention that if these expenditures are authorized by the Act the statute constitutes a "law respecting an establishment of religion" and a law "prohibiting the free exercise thereof" in violation of the First Amendment to the Constitution of the United States. Defendants opposed the application for the convening of a three-judge court and moved to dismiss the complaint on the ground that plaintiffs lack standing to sue. The application for a three-judge court was granted. See *Flast v. Gardper*, 66 Civ. 4102 (S.D.N.Y. April 27, 1967). We must decide defendants' motion to dismiss the complaint.

A group of parents whose children attend religiously operated schools and receive or are eligible to receive special educational help available under the Elementary and Secondary Education Act of 1965 have requested leave to intervene as defendants in this action.

We hold that plaintiffs have no standing to bring this action, that there is thus no justiciable controversy and this court therefore lacks jurisdiction of the subject matter.

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Our disposition of the case makes it unnecessary, for reasons set out more fully below, to pass on the application for intervention.

I.

The issue of plaintiffs' standing has been presented separately and we have received briefs and heard argument only on this preliminary issue.

It is clear that if plaintiffs have standing to sue it is because they pay federal income taxes.

Consideration of the standing of a federal taxpayer to sue to prevent the depletion of the federal treasury caused by the expenditure of federal funds for unconstitutional purposes must begin with the Supreme Court's decision in *Frothingham v. Mellon*, 262 U. S. 447 (1923). In that case a taxpayer sought to enjoin administration of the Maternity Act of 1921 which provided for the appropriation of federal funds to combat maternal and infant mortality. The taxpayer claimed that by enacting the statute Congress had exceeded its powers and had usurped powers reserved to the states by the Tenth Amendment to the Constitution, and that the effect of the appropriation would be "to increase the burden of future taxation and thereby take her property without due process of law." 262 U. S. at 486.

The Supreme Court distinguished cases permitting municipal taxpayers to sue to enjoin the expenditure of municipal funds and stated that the interest of a federal taxpayer "in the moneys of the Treasury * * * is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain,

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that no basis is afforded for an appeal to the preventive powers of a court of equity." 262 U. S. at 487.

The Court held that a federal taxpayer, as such, cannot make the showing, necessary for obtaining judicial review of a statute, "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." 262 U. S. at 488.

Plaintiffs contend that the *Frothingham* decision establishes a rule of judicial self-restraint rather than a limitation on the jurisdiction of the federal courts under Article III, Section 2 of the Federal Constitution. They argue that viewed as an expression of the policy of judicial self-restraint the *Frothingham* rule has no application to issues arising out of the Free Exercise and Establishment Clauses of the First Amendment.

Since the *Frothingham* decision is binding on this court regardless of whether it states a constitutional principle or a rule of policy, we need not consider the much debated question whether the rule is one of constitutional dimension.¹ Moreover, plaintiffs' attempt to distinguish *Frothingham* on the ground that the instant litigation involves rights protected by the First Amendment must be rejected.

1. See, e.g., *Doremus v. Board of Education*, 342 U. S. 429, 434-35 (1952); Davis, "Judicial Control of Administrative Action": A Review, 66 Colum. L. Rev. 635, 666 (1966); 3 Davis, Administrative Law, §22.09, at 243 (1958) and §22.10, at 64 (Supp. 1965); S. Rep. No. 85, 90th Cong., 1st Sess. 4 (1967); Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., Part 2, 492-501 (1966) (Statements of Professors Davis, Griswold and Freund); 111 Cong. Rec. 6131-32 (1965) (remarks of Representative Celler).

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in light of the Supreme Court's decision in *Doremus v. Board of Education*, 342 U. S. 429 (1952). In that case a group of taxpayers sought a judgment declaring unconstitutional under the Establishment Clause a New Jersey statute that provided for the reading of verses from the Old Testament at the beginning of each school day. The Supreme Court, citing *Frothingham v. Mellon* and quoting from its opinion in that case, held that plaintiffs lacked standing to raise this First Amendment claim:

"Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.' *Massachusetts v. Mellon*, *supra*, at 488.

It is true that this Court found a justiciable controversy in *Everson v. Board of Education*, 330 U. S. 1. But *Everson* showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not.

We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case of controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law

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without review, any procedure which does not constitute such.

The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here." 342 U. S. at 434-35. See, e.g., *Elliott v. White*, 23 F.2d 997 (D. C. Cir. 1928); *Protestants and Other Americans United v. United States*, No. 3303 (S.D. Ohio, March 20, 1967); cf. *Abington School Dist. v. Schempp*, 374 U. S. 203, 224 n.9 (1963); 111 Cong. Rec. 7317-18 (1965); S. Rep. No. 85, 90th Cong., 1st Sess. 5-7, 17-18 (1967).

As the quoted material makes clear, *Everson v. Board of Education*, 330 U. S. 1 (1947) does not support plaintiff's position since that action was brought by a local taxpayer whose economic interests were directly affected by local school board expenditures. Inapposite too are cases such as *Abington School District v. Schempp*, supra, *Engel v. Vitale*, 370 U. S. 421 (1962); *Zorach v. Clauson*, 343 U. S. 306 (1952); and *McCollum v. Board of Education*, 333 U. S. 203 (1948). In each of these cases the plaintiffs were either children attending public schools or their parents who were "directly affected by the laws and practices against which their complaints are directed." *Abington School District v.*

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Schempp, supra, 374 U. S. at 224 n.9; see *Zorach v. Clauson*, supra, 343 U. S. at 309 n.4; cf. *McGowan v. Maryland*, 366 U. S. 420, 429-31 (1961).

Finally, although the *Frothingham* rule has been criticized² the case has never been overruled or limited by the Supreme Court;³ indeed, the citation of *Frothingham* in the recent case of *Abbott Laboratories v. Gardner*, 35 U. S. L. Week 4433, 4438 (U. S. May 22, 1967) attests to its continuing vitality. That the Senate has recently passed a bill for the express purpose of creating an exception to the *Frothingham* rule by conferring standing on any federal taxpayer to raise the First Amendment questions tendered here (see S. 3, 90th Cong., 1st Sess.; S. Rep. No. 85, 90th Cong., 1st Sess. 4-7 (1967)), further supports our conclusion.

II.

Our disposition of the case makes it unnecessary for us to pass upon the application for intervention. The involvement of the proposed intervenors in the consideration of the motion to dismiss could not have been greater had the motion to intervene been granted. They have filed briefs and participated in oral argument. The contention on which they base their claim that their interests will not be adequately represented by the present defendants, that if the

2. See, e.g., Davis, "Judicial Control of Administrative Action": A Review, 66 Colum. L. Rev. 635, 659-69 (1966); Davis, Administrative Law §22.09 (1958); Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., Part 2, 492-96, 498-500 (1966); but see Dean Griswold's view, Hearings, supra, 496-97 (1966); Note, Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895, 918-19 (1960).

3. But cf. *Public Affairs Associates, Inc. v. Rickover*, 369 U. S. 111, 114 (1962) (concurring opinion).

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Elementary and Secondary Education Act did not confer equal benefits on parochial school children it would interfere with their right of free exercise of their religion, would be material only if this court were to reach the merits of plaintiffs' complaint. Since we do not reach the merits we need not decide whether this argument of the proposed intervenors requires that permission to intervene be granted.

The Clerk is directed to dismiss the complaint for lack of jurisdiction of the subject matter.

PAUL R. HAYS

U.S.C.J.

JOHN F. X. MCGOHEY

June 19, 1967

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FRANKEL, District Judge (dissenting):

There is no disagreement among us as to the principle that we ought almost invariably to follow rather than anticipate Supreme Court precedents. Unless the Supreme Court has made perfectly clear that one of its earlier cases is about to be overruled,¹ or unless a decision has been eviscerated without benefit of Shepard's formal rites,² we are to adhere faithfully to the precedents given us at our time of decision. Granting the force of these principles, I cannot agree that the course we should follow here is charted by *Frothingham v. Mellon*, 262 U. S. 447 (1923), or any other single decision. The Supreme Court has never confronted directly the troublesome question of standing we have in this case. And I believe that the doctrines of the Court's decisions relevant to our inquiry entail a conclusion contrary to that of the majority. Accordingly, with the utmost deference, I must respectfully dissent from the decision that plaintiffs lack standing.

In organizing the thoughts leading to this conclusion, it has seemed convenient to begin with an affirmative statement of the reasons for holding that plaintiffs have standing, and to turn then to the grounds for distinguishing *Frothingham*. I shall proceed in that order.

I

It is appropriate, whether or not it should be necessary, to emphasize at the outset that our divergent conclusions on standing import no views as to whether plaintiffs would

1. See *Barnette v. West Virginia Board of Ed.*, 47 F. Supp. 251, 252-253 (S.D.W. Va. 1942), *aff'd*, 319 U. S. 624 (1943).

2. See *Gold v. DiCarlo*, 235 F. Supp. 817, 818-20 (S.D.N.Y. 1964), *aff'd*, 380 U. S. 520 (1965).

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ultimately prevail on the merits. See *Baker v. Carr*, 369 U. S. 186, 208 (1962). Given only that the issues posed under the First Amendment are not frivolous,³ the issue decided today could not be affected by a forecast, if we made one, that the complaint must ultimately be dismissed on substantive grounds. Cf. *Bell v. Hood*, 327 U. S. 678, 683 (1946). On the other hand, to complete the perspective, the Government acknowledges that its arguments opposing plaintiffs' standing would be no different if the case involved federal appropriations to build churches for particular sects—i.e., presumably clear violations of the First Amendment's ban against laws "respecting an establishment of religion" * * *⁴

3. A proposition earlier, and properly, conceded by defendants. The Government moved for dismissal by a single judge, without convening a three-judge court, when the case first came to me, on the sole ground that the claim of *standing* lacked sufficient substance to be heard by three judges. It was acknowledged at the time that no similar contention was being made with respect to the merits of the complaint. Cf. Department of Health, Education, and Welfare, *Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education*, 50 Geo. L. J. 349 (1961).

4. This concession by the Government, though not binding upon us, would seem inevitable as a matter of logic and intellectual honesty that have characterized the efforts of government counsel in this case as in others. No less properly, government counsel noted that the unlikely case of an appropriation to build a church might fortuitously give standing to someone other than a taxpayer—e.g., a property owner resisting condemnation of his land for the questioned purpose. But that sort of remotely possible happenstance does not basically affect the dimensions of the problem. Moreover, it would not be pertinent to other hypotheticals that could be put—for example, the use of government funds to pay the salaries of clerics, to support existing religious structures, etc. In strict logic, the issue of standing remains separate, preliminary, and unchanged throughout, though it is fair to recognize that some non-logical nerve may tingle when the stark proposition is put that concededly unlawful or unconstitutional action is in effect immune from judicial scrutiny. Cf. *Harmon v. Brucker*, 355 U. S. 579 (1958); *Leedom v. Kyne*, 358 U. S. 184 (1958).

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In a word, the issue decided today may be stated this way: Does a plaintiff, suing as a federal "citizen and taxpayer," assert "a legally cognizable injury," sustained by him, *Baker v. Carr, supra*, at 208, when he alleges that a federal statute authorizes, or is being applied to grant, support for one or more religious establishments? "The touchstone * * * is injury to a legally protected right * * *." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 140-41 (1951) (opinion of Burton, J., joined by Douglas, J.). The asserted right "may be based on an interest created by the Constitution or a statute." *Id.* at 152 (Frankfurter, J., concurring); see also *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 64 n. 6 (1963); *Alabama Power Co. v. Ickes*, 302 U. S. 464, 475, 478-79 (1938).

Another, more recent, and obviously pertinent formulation of the concept is this: "Have the [plaintiffs] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing." *Baker v. Carr, supra*, at 204.

Appraising the substantive character of the wrong asserted in the complaint in light of the foregoing definitions, it seems reasonably clear to me that plaintiffs have standing to maintain this suit. They allege the vividly personal, vital, intimate, and grave hurt against which the Establishment Clause was meant to guard. And unless they can sue to redress this kind of grievance, the first of the "preferred freedoms" safeguarded by the First Amendment is substantially unenforceable against federal violations, to which

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the Amendment was initially, and for a long time exclusively, directed.⁵

1. *The Establishment Clause forbids the use of tax money to support any religion, and confers an enforceable "right" upon the federal taxpayer claiming this basic protection.*⁶

It is now familiar to all who have touched this subject that a central concern—perhaps the most central concern—of the Establishment Clause is to ban utterly the use of public moneys to support any religion or all religions. The history is reviewed in *Everson v. Board of Education*, 330 U. S. 1 (1947), and there is no reason to repeat at length what the Supreme Court has said there and elsewhere. It is sufficient to recall that both the majority and the dissenters in that case recognized, affirmed, and undertook to apply the vital First Amendment principle forbidding the "support" of churches through the exaction of "taxes and tithes." See, e.g., 330 U. S. at 8, 9, 10, 11; *id.* at 21, 22, 24,

5. The Establishment Clause is literally the first one in the First Amendment. It may be acknowledged in passing that this does not elevate it above the rest of the Article. See *Prince v. Massachusetts*, 321 U. S. 158, 164 (1944). The point approaches pedantry, however; it should be enough to note the familiar principle that the whole of the First Amendment occupies a "preferred position" (*id.* at 164, 167) in our constitutional firmament and is most notably and singularly in the domain of the personal liberties entitled to judicial protection.

6. This dissent is confined to the proposition that plaintiffs have standing to assert their claim under the Establishment Clause. As the complaint now stands, it seems unlikely that they could also demonstrate standing under the Free Exercise Clause, on which they also count. See *McGowan v. Maryland*, 366 U. S. 420, 429-30 (1961). While it probably makes no practical difference, if my views had prevailed, decision of the latter question could have been postponed until the court had a full record on the merits of plaintiffs' claims, possibly including some pertinent amendments to the complaint to conform to what might ultimately be proved.

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26 (Jackson, J., dissenting); *id.* at 32, 33, 36-37, 40-41, 43, 44-45 (Rutledge, J., dissenting).⁷

“* * * The imposition of taxes to pay ministers’ salaries and to build and maintain churches and church property aroused their indignation. * * * It was these feelings which found expression in the First Amendment. * * * Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.” *Id.* at 11.

Following the quoted passage, the Court traced the “dramatic climax in Virginia in 1785-86,” the collaborative struggles of Jefferson and Madison, the latter’s famous Remonstrance, and the resulting “Virginia Bill for Religious Liberty,” with its ban against enforced public support of any church or religion. *Id.* at 11-13. And it reaffirmed (*id.* at 13) “that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection

7. The fullest account of the point is in the dissent of Mr. Justice Rutledge, who printed as an Appendix Madison’s *Memorial and Remonstrance against Religious Assessments* of 1785, 330 U. S. at 63 *et seq.* Although in dissent, what Mr. Justice Rutledge wrote and collected there has continued to be cited by the Court to reflect the agreed understanding of the evils that generated, and were meant to be proscribed by, the Establishment Clause. See, e.g., *Abington School District v. Schempp*, 374 U. S. 203, 218-19 (1963); *Torcaso v. Watkins*, 367 U. S. 488, 492 n.7, 493 (1961); *McCollum v. Board of Education*, 333 U. S. 203, 210 notes 6 and 7 (1948).

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against governmental intrusion on religious liberty as the Virginia statute."

"Support" by the use of taxpayers' money lay at the heart of Jefferson's and Madison's concern. Madison's Remonstrance, "an event basic in the history of religious liberty," *McCullum v. Board of Education*, *supra*, 333 U. S. at 214 (Frankfurter, J., concurring), was written, after all, to denounce proposed "religious assessments"—and indeed, assessments to be used for "support to religious education." *Ibid.* In that historic document he argued successfully, and led to the First Amendment's assurance, that no federal official should be empowered to "force a citizen to contribute three pence only of his property for the support of any one establishment * * *." 330 U. S. at 65-66. To allow even such trivial exactions, he wrote, would empower the official to force the citizen "to conform to any other establishment in all cases whatsoever * * *." *Id.* at 66. And so it was essential "to take alarm at the first experiment on our liberties" (*id.* at 65)—to strike, as had the "freemen of America," before usurpation had become habit "and entangled the question in precedents." *Ibid.*

The assorted wrong, if the Establishment Clause has been violated, is for every unwilling contributor the very kind of "support" against which the Amendment was directed. "The matter is not one of quantity, to be measured by the amount of money expended." *Everson*, *supra*, at 63 (Rutledge, J., dissenting). The separation must be "complete and unequivocal," *Zorach v. Clauson*, 343 U. S. 306, 312 (1952); the "slightest breach" is to be resisted. *Everson*, *supra*, at 18. If there is "support," as plaintiffs here allege, then the "wall of separation" has been breached, and the evil denounced by the First Amendment has been realized.

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But why the separation? Why the wall? Who, if anyone, is hurt by breaches? What is the nature of the hurt?

These questions, which ask about "standing," find recent responses in *Engel v. Vitale*, 370 U. S. 421 (1962), where the Court recalled what the Framers had learned in their blood about the meaning of "establishment." It said, in passages pertinent here (*id.* at 430-33, emphasis added):

"* * * The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether these laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. *When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.* * * *

Another purpose of the Establishment Clause rested upon an awareness of the historical fact that *governmentally established religions and religious persecutions go hand and hand.* * * * The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind * * *—a law which was consistently flouted by dissenting religious groups in England and which contributed to

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widespread persecutions of people like John Bunyan who persisted in holding 'unlawful (religious) meetings . . . to the great disturbance and distraction of the good subjects of this kingdom'. And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies. *It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion."*

Those words describe the subject matter of this lawsuit, whether or not plaintiffs are right on the merits, so far as our issue of standing is concerned. We deal with what the Bill of Rights enshrines as the most sacred of things, the hearts and the spirits of men. The claim is that the plaintiffs' money is being used in an official program which is being conducted so as to violate the First Amendment's protection of these and other citizens against the danger of coercion, thought-control, and persecution.

If we wrote on an utterly clean slate, even the fact of tax payments might be immaterial. Our direct knowledge of tyranny ought to be fresh enough to teach that there may be, in the kind of wrong against which plaintiffs complain, immediate and personal assault sufficient to comprise "legal injury." Even "novelty," after all, has not prevented the courts from recognizing "justiciability" within the framework of our constitutional scheme. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. *supra*, at 159 (Frankfurter, J., concurring). It should be no more difficult to identify an "injury," amounting to the beginnings of "coercion" and "persecution," so dramatically

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central in the concerns of those who wrote the First Amendment. It might be argued that the responsibly asserted grievance of anyone who felt the chill of threatened persecution is no less palpable a ground for standing than the complaint of a suitor who "chooses" to feel the spiritual blows struck by systems of racial segregation.⁸

But there is no need to reach that far. The subject is one on which volumes of history outweigh any new pages of logic we might essay at this date. It is enough, I think, that the injury asserted by the taxpayer is at the core of the right enthroned by the First Amendment. Asserting the right in its pristine form, plaintiffs are entitled to have their claim heard.

2. *A federal taxpayer should be accorded the same standing under the First Amendment as is accorded state taxpayers under Everson.*

After sketching the historical background of the First Amendment, the Court in *Everson* stated what it then, and has since, deemed the governing substantive principles (330 U. S. at 15-16):

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state

8. It is now thirteen years since the erasure of the notion that racial discrimination could be deemed a "badge of inferiority * * * solely because the colored race chooses to put that construction upon it." *Plessy v. Ferguson*, 163 U. S. 527; 551 (1896), overruled in *Brown v. Board of Education*, 347 U. S. 483, 494-95 (1954). By now, surely, the courts have come to know that affronts to the spirit and conscience of men may be intensely genuine precisely because they are experienced as such. Thus, as Judge Soper said for the Fourth Circuit, in rejecting arguments reminiscent of the *Plessy* era: "We must give first place to the rights of the individual citizen, and when and where he seeks only equality of treatment before the law, his suit must prevail. It is for him to decide in which direction his advantage lies." *McKissick v. Carmichael*, 187 F.2d 949, 954, cert. denied, 341 U. S. 951 (1951).

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nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.' *Reynolds v. United States, supra* at 164."

Applying those principles, the Court rejected (5-4) the claim of the plaintiff taxpayer that the First Amendment—there, via the Fourteenth—forbade reimbursement of parents for the bus transportation of their children to sectarian schools. But the critical points of that decision for us are not, at this stage, in the particular result on the merits. There are two beacons in the case and its aftermath that ought to guide us to our conclusion on today's question of standing:

- (1) The unanimity of the Court on the proposition that the Establishment Clause forbids support of any religion from the public treasury—i.e., that the "right" protected makes it a "legal injury" to have one's money taken and used for the proscribed purpose.

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(2) The fact that no doubt was suggested concerning the standing of the complaining taxpayer, in the highest Federal Court as well as in the State's courts. While the question was not discussed in *Everson*, it has since become clear that the taxpayer was properly, if tacitly, accorded such standing. See *Doremus v. Board of Education*, 342 U. S. 429, 434 (1952).

This second point is the decisive one. There is no basis in principle or reason for allowing a state taxpayer to attack a "law respecting an establishment of religion" while denying the same right to a federal taxpayer opposing intrusion into the forbidden area by the Federal Government, the power of which remains more fearsome today, as it was when it comprised the exclusive concern of the Framers.

Everson started, of course, as the familiar form of state taxpayer's suit, subject at the state level to state notions about standing. However, to be heard on the merits in the Supreme Court, as he was, the appellant was required to show standing in the federal sense. If this was unclear at the time of *Everson*, it was made clear in *Doremus v. Board of Education*, *supra*, 342 U. S. at 434-35, where failure to show the "requisite financial interest" led to dismissal of the appeal because of the "case or controversy" requirement in Article III of the Federal Constitution. And it seems to be clear still that standing at any level of the federal system "is, of course, a question of federal law." *Baker v. Carr*, *supra*, 369 U. S. at 204.⁹

9. This does not require us to explore in a case begun in federal court the interesting thought, thus far not accepted in the Supreme Court, that "standing to raise a federal constitutional question" should be treated as being "itself a federal question, so that it will be decided uniformly throughout the country." Paul Freund in Cahn (ed.), *Supreme Court and Supreme Law* 35 (1954).

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Nobody has suggested that the standing accorded in *Everson*, as thus explicated, is any less clear today for a state taxpayer. That continued position supplies, in my judgment, positive and substantially square ground on which standing should be found here.

The prime point—that Article III applies indifferently to both situations—has been noted already. What else is there? In *Doremus*, the Court said *Everson* had shown “a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of.” 342 U. S. at 434. I do not find, at least in the *Everson* opinion, any precise “measurement” of plaintiff’s tax burden. There is no suggestion whether plaintiff there had identified a nickel or a dollar or a thousand dollars of his spent for “the activities complained of.”

All that was evidently meant was that the incremental money value of the time spent on the bible-reading assailed in *Doremus* was not practically “measurable” to the extent possible with respect to the reimbursed bus fares in *Everson*. And it may well have been significant that plaintiffs in *Doremus*, unlike the plaintiffs here, did not allege in their complaint any specific “appropriation or disbursement” of public funds for the bible-reading. No such obstacles exist here. The complaint is rested squarely upon alleged expenditures said to violate the Establishment Clause. If measurement is wanted in this age of computers, it can surely be had. We have only a complaint and a motion to dismiss before us. We do not know how rich the plaintiffs are or how much they pay in taxes. We do not know the size of the expenditures of which they complain. It may be that they can show measurably larger financial stakes than those of the taxpayer in *Everson*. All of this is surely knowable if anyone cares, and its omission from our barren record at this time would not in itself justify dismissal now.

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I would submit, however, that measurements of this sort could hardly have been declared vital for a First Amendment claim, whatever else the quoted language of *Doremus* may have meant. While the complaint charges unconstitutional expenditures, the claimed injury relates to familiar "consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." *McCullum v. Board of Education*, *supra*, 333 U. S. at 228 (Frankfurter, J., concurring).

It was also said in *Doremus* (342 U. S. at 435) that the appellants showed "no such direct and particular financial interest" as to ground the kind of standing allowed in *Everson*. In their context, those words would appear to have referred again to the fact that the plaintiffs made no allegation that any added tax moneys were being expended for bible-reading. That pleading deficiency, as I have just noted, does not exist here. Nevertheless, there has been some suggestion in the argument before us that plaintiffs might well have a right to sue if there were a specific federal tax, separately assessed and collected, for the use they claim is forbidden. But this borders on the frivolous. The First Amendment's commands, so sensitively and astutely enforced in their essential substance under the decisions of the Supreme Court, would be trivialized if they could be avoided by details of government bookkeeping or fiscal regulation. "What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." *Abington School District v. Schempp*, *supra*, 374 U. S. at 230 (Douglas, J., concurring).

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It seems perfectly obvious that those who wrote the First Amendment would have been astonished by the suggestion that it might come to be enforceable *only* against the States and not against the Federal Government. The familiar words are that "*Congress shall make no law respecting an establishment of religion . . .*" When they were written, they were applicable only to the Federal Government, and they remained so confined until just a generation ago.¹⁰ It was the national power that the Founders feared and undertook to curb. See *McGowan v. Maryland*, *supra*, 366 U. S. at 440-42; *Everson v. Board of Education*, *supra*, 330 U. S. at 13; Freund, "The Legal Issue," in *Religion and the Public Schools*, 4, 8-9 (1965). Indeed, when they fashioned the Bill of Rights, established churches were still, if not for long, familiar in the States, and it was clear that the First Amendment left that situation untouched. See *McGowan v. Maryland*, *supra*, 366 U. S. at 486 (Frankfurter, J., concurring); *Abington School District v. Schempp*, *supra*, 374 U. S. at 214 n.5.

There is no question now, of course, that the First Amendment applies with full force to the States. But it is a ludicrous anomaly to close the circle, as the majority opinion does, by making at least the Establishment Clause a substantial nullity with respect to the Federal Government. See Jaffe, *Standing to Secure Judicial Review: Pub-*

10. It was not settled plainly until *Gantwell v. Connecticut*, 310 U. S. 296 (1940), that the clauses here in question applied to the States under the Fourteenth Amendment, although there had been a broad intimation of this in 1923, in the volume that contains *Frothingham v. Mellon*. *Meyer v. Nebraska*, 262 U. S. 390, 399. See *Abington School District v. Schempp*, *supra*, 374 U. S. at 253-54 (Brennan, J., concurring). While it is ancient history now, it is of passing interest to recall that there were efforts after adoption of the Fourteenth Amendment to enact a specific amendment forbidding support of religion and insuring free exercise in the States. See *id.* at 256-58.

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lic Actions, 74 Harv. L. Rev. 1265, 1310-11 (1961). The Supreme Court has never faced, let alone ordered, this historically and logically unacceptable paradox. Until or unless it does, and while the unanimously accepted principles of *Everson* stand, I would allow suits like the one plaintiffs have brought.

3. *The fact that, as a practical matter, only plaintiffs like the ones here can sue is in itself a ground for their standing.*

The rules on standing, tied to fundamental premises governing the role of courts in our system, have been evolved judicially over the years, and continue to evolve, to fit the needs of a living Constitution. The rules are not, and in their nature cannot be, mechanical generalities. "[T]he concept of standing is a necessarily flexible one, designed principally to ensure that the plaintiffs have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions * * *.'" *Abington School District v. Schempp*, *supra*, 374 U. S. at 267 n.30 (Brennan, J., concurring, and quoting from his opinion for the Court in *Baker v. Carr*, *supra*, 369 U. S. at 204).¹¹ If this idea of flexibility means anything, it means

11. I have used earlier the quoted language from *Baker v. Carr* concerning this need for "concrete adverseness." The thought was not further elaborated in *Baker v. Carr*, and did not have to be. Similarly here, there has not been any suggestion that the suit is not genuine, robustly adverse, and likely to be fought on the kind of sharp and thorough presentation the courts must have for problems of such moment. The briefs already before us reflect this. We are perhaps entitled to notice that plaintiffs' lead counsel has authored or co-authored substantial volumes on the subject of the litigation. See Pfeffer, *Church, State and Freedom* (rev. ed. 1967); Stokes and Pfeffer, *Church and State in the United States* (1964). There is, in a word, clear fulfillment of the practical criteria formulated by Mr. Justice Brennan, and followed by the Court in *Baker v. Carr*.

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that refined judgments must be made upon the nature of the interests at stake, the appropriate functions of judges with respect to such interests, and the practical consequences in our constitutional scheme of granting or denying standing in any particular case.

And so, when we deal with the subject of First Amendment freedoms, it is essential to start by recognizing (as Mr. Justice Brennan did in the passage quoted above) that it has fallen to the courts in our system to perform "the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century * * *." *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 639 (1943). In discharging this responsibility in cases under the First Amendment, the highest Court has observed more than once that effective enforcement of the "delicate and vulnerable, as well as supremely precious" rights at stake (*N.A.A.C.P. v. Button*, 371 U. S. 415, 433 (1963)) may require exceptions "to the usual rules governing standing * * *." *Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965); see also *United States v. Raines*, 362 U. S. 17, 22 (1960); *Freedman v. Maryland*, 380 U. S. 51, 56-57 (1965).

One such exception, highly pertinent here, is the idea that where asserted violations of the First Amendment are in issue, a particular plaintiff or class of plaintiffs may be found to have standing because to deny it "might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment—even though no special monetary injury could be shown." *Abington School District v. Schempp*, *supra*, 374 U. S. at 266 n.30 (Brennan, J., concurring); see also *Bantam Books, Inc. v. Sullivan*, *supra*,

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372 U. S. at 64-65 n.6; *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 459 (1958); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

It is not the law generally, of course, that *someone* must have standing to bring alleged violations of the Constitution to court. On the contrary, to go no farther than the still vital teachings of *Frothingham v. Mellon*, it is clear that there are areas of the law where nobody has such standing. But it will be found upon analysis that in such cases, whether expressly or not, the crux of the matter is that the subject is one confided to the final authority of branches other than the judiciary—that the cases are, to categorize them more precisely, non-justiciable. See, generally, *Baker v. Carr*, *supra*, 369 U. S. at 208 *et seq.* This, I submit, is the sufficient ground for cases like *Pauling v. McElroy*, 278 F.2d 252. (D. C. Cir.), *cert. denied*, 364 U. S. 835 (1960) and *Pauling v. McNamara*, 331 F.2d 796 (D. C. Cir. 1963), *cert. denied*, 377 U. S. 933 (1964), cited by defendants, where the plaintiffs sought to enjoin nuclear testing.

Whatever may be said about nuclear testing, declarations of war and peace, and other matters confided primarily or exclusively to the “political” departments, the subject of the First Amendment is a quite different one. The high promises of that Amendment, as the years have unfolded them and given them meaning, are peculiarly for the courts to enforce. As the Court said in *West Virginia State Board of Education v. Barnette*, *supra*, 319 U. S. at 638:

“The very purpose of a Bill of Rights was to withdraw certain subjects from the viscissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal prin-

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ciples to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

See also *Thomas v. Collins*, 323 U. S. 516, 529-30 (1945); *United States v. C.I.O.*, 335 U. S. 106, 139-40 (1948) (Rutledge J., concurring); *United States v. Carolene Products Co.*, 304 U. S. 144, 152 n.4 (1938).

Where, as in this case, it is substantially conceded that only people like the plaintiffs before the court can complain as a practical matter, this is in itself weighty reason for doubting that notions of "standing" imported from wholly alien contexts should serve to make lifeless slogans of basic liberties.

4. *Doubts about the merits must not obscure or impair the place of the First Amendment as a barrier against the "first experiment on our liberties."*

Elaborating on the discussion under the preceding heading, I venture to suggest again (see note 4; *supra*) that this decision might be going the other way if plaintiffs were asserting a patent violation of the Establishment Clause—the building of churches with federal money, payment of clerical salaries, or other unthinkable measures of some similar nature. While we are together in eschewing any intimation on the merits, I think it permissible to say that plaintiffs' claim obviously falls short of any such plainly demonstrable breach. (Compare the 4-3 decision of the New York Court of Appeals on June 1, 1967, in *Board of Education of Central School District No. 1 v. Allen*, —)

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N.Y.2d —, upholding state loans of textbooks to parochial as well as public school children.) But I think it bears special emphasis, however a later decision might distinguish what is done today, that there is no principal difference between this case and the unimaginable ones I have hypothesized.

The emphasis is fair, I think, for several reasons. First, it makes vivid the sweeping extent to which this decision on standing nullifies the Establishment Clause as a judicially enforceable protection against federal action. Similarly, it helps to demonstrate the discordance between this ruling and the deep concerns of those who gave us the First Amendment. The Founders, it is pertinent to recall again, were zealous to guard against even minute approaches to the problems of established religions that were so immediate and acute for them. They wrote with deliberate sweep not merely against laws establishing a church or religion, but against any "law respecting" that form of official coercion. See *McGowan v. Maryland*, *supra*, 366 U. S. at 441-42. The Supreme Court has enforced the broad prohibition with rigor. It has allowed no leeway for practices that "may be relatively minor encroachments on the First Amendment." *Abington School District v. Schempp*, *supra*, 374 U. S. at 225. For, as the Court has said (*ibid.*): "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" See also *Engel v. Vitale*, *supra*, 370 U. S. at 436, *Thomas v. Collins*, *supra*, 323 U. S. at 530.

That fundamental approach should move us on the problem. A decision refusing to hear a case where there may be only "minor encroachments" or no encroachments at all could come to be a plague in the perhaps unlikely, but pos-

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sible, case of broader assaults upon the wall of separation. The time to make clear the scope of the protection is at the earliest moment, not when controversy may become or has become exacerbated by "the anguish, hardship and bitter strife" with which the history of this subject is so painfully filled. *Engel v. Vitale, supra*, at 429. To recall again the compelling thoughts of Madison's Remonstrance, it is our duty to maintain the protection in its full, unfettered vigor, and to see that it never becomes "entangled * * * in precedents" that may weaken or choke it. *Everson v. Board of Education, supra*, 330 U. S. at 65.

Concepts of standing have been adapted in our time to safeguard interests far less dear than those assessed in this case. The Congress, with the approval of the Supreme Court, has allowed review of official action in matters of economic regulation at the instance of "private litigants [who] have standing only as representatives of the public interest." *Scripps-Howard Radio v. Federal Communications Commission*, 316 U. S. 4, 14 (1942). We have witnessed the increasing appearances and ready acceptance of suitors attacking official action in the role of Judge Frank identified as that of "private Attorney Generals." *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated and remanded*, 320 U. S. 707 (1943).¹²

12. A word may be said at this point about the Government's fleeting observation that the Senate has passed a bill (S. 3, 90th Cong., 1st Sess. (1967)) which would provide for the standing plaintiffs seek in this case. The Senate has voted other such bills in the past. See S.2097, 89th Cong., 2d Sess. (1966); H.R. 4163, 88th Cong., 1st Sess. (1963) as amended in the Senate, 109 Cong. Rec. 19357, 19891 (1963), the amendment, however, being later deleted in conference. The bills, and the discussion about them, are interesting in their reflection of how accepted it has become that the authoritative construction of the First Amendment must be sought from the Supreme Court. What I urge here is simply that there is no need for the courts to await such legislation before exercising this familiar, generally agreed, and central item of their responsibilities.

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It is strange, I think, for the courts to be more niggardly in defining standing before them for litigants asserting the most basic and urgent of occasions for judicial protection. If this incongruous sort of abstention is proper, it can only be because it is thought to be required by canons of judicial self-restraint that are so wise and so essential in their place. In my understanding of the First Amendment, as the Supreme Court has enforced it, those canons have no place here.

II

Contrary to the majority, I believe that *Frothingham v. Mellon*, 262 U. S. 447 (1923) neither requires nor justifies the conclusion that plaintiffs lack standing in this case. In that lawsuit—decided, incidentally, before any of the great cases that have given the First Amendment the meaning we know today—Mrs. Frothingham sought to challenge the constitutionality of the Maternity Act of November 23, 1921. She sued as “a citizen of the United States and of the State of Massachusetts,” and as “a tax payer of the United States.”¹³ She did not claim or suggest that the Maternity Act as such had any impact upon her or upon any specific rights of hers assertedly protected by the Federal Constitution. Instead, her claim was that the statute was beyond the powers of Congress; that it invaded the powers reserved to the States by the Tenth Amendment; that the financial burdens of it fell unequally upon the States; that “her constitutional rights to have taxes levied and assessed against her by the United States for those purposes alone for which the Constitution of the United States provides and to have the taxes paid by her to the United States appropriated by the Congress of the United States in the manner provided by the Constitution * * *

13. Complaint, par. I, in the Supreme Court Record, *Frothingham v. Mellon*, Oct. Term 1922, No. 962, p. 2.

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[had] been infringed and violated;”¹⁴ and that the effect of all this was to deprive her of her property without due process of law.

That was the case, said to be controlling here, in which the Supreme Court denied Mrs. Frothingham’s standing as a taxpayer. I shall review just below the reasons given for that result in Mr. Justice Sutherland’s opinion for the Court, and attempt to show why those reasons have little or no application to the present problem. First, however, it may profit to look at the matter broadly and observe what I perceive as obviously decisive differences between the cases.

What Mrs. Frothingham claimed in an action that seems on its face so absurd today was nothing less than a roving commission, based upon her status as taxpayer, to have an adjudication concerning the validity of any appropriation of money by the Congress. This meant in effect that she or any taxpayer, solely as taxpayer, would be entitled to review of practically any federal statute, since it is always—or, at least almost always—the case that appropriations are discernible as the energizing force behind official action. The Maternity Act did not touch any of Mrs. Frothingham’s supposed rights, and she made no claim that it did. In a word, as Mr. Justice Harlan indicated for the Supreme Court just the other day, *Frothingham v. Mellon*, read without forgetting what it was about, stands for the scarcely debatable proposition “that a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action.” *Abbott Laboratories v. Gardner*, — U. S. —, — (1967) (emphasis added).

The case before us differs sharply from Mrs. Frothingham’s on the question of standing just as (and, indeed,

14. *Id.*, par. III (h), Record, p. 6.

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because) it differs in the nature of the substantive interests involved. The taxpayers here claim no general right as taxpayers to review federal action. What they invoke is the specific right, defined broadly but certainly by the Establishment Clause, to be free of any "tax in any amount, large or small, * * * levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson v. Board of Education*, *supra*, 330 U. S. at 16. As was not the case for Mrs. Frothingham, the substance of the statute in issue is for the plaintiffs before us the very heart of the matter. Of course, the essence of their asserted right is bound up, as it was for Madison and his colleagues in the framing of the First Amendment, with the forbidden use of public moneys to support religious establishments. But there is nothing here resembling a claim like Mrs. Frothingham's to a general right of review over appropriations. While it centers on the use of funds, plaintiffs' suit seeks the particularized and intimately personal protection of the First Amendment from the kind of "coercion," "compulsion," and at least threatened "persecution" against which the Establishment Clause was meant to guard.

In sum, to use the words of another opinion for the Court by Mr. Justice Sutherland (citing *Frothingham*), Mrs. Frothingham's case failed because she asserted "no legal or equitable right" eligible for judicial protection, "no such interest and * * * no such legal injury" as the courts are constituted to redress. *Alabama Power Co. v. Ickes*, *supra*, 302 U. S. at 475, 478. The plaintiffs here, on the other hand, invoke a clear and "specific limitation," *Gomillion v. Lightfoot*, 364 U. S. 339, 343 (1960); they assert now familiar "legal rights" given by the Establishment Clause; they allege a "personal stake" and "an

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interest of their own" no less clear and no less justiciable than the one in *Baker v. Carr*, *supra*, 369 U. S. at 204, 207, from which the quoted phrases come; they present a case that is not merely in "the conventional sphere of constitutional litigation," *Gomillion v. Lightfoot*, *supra*, at 347, but one entitled to the "close scrutiny demanded * * * when First Amendment Liberties are at issue * * *." *McGowan v. Maryland*, *supra*, 366 U. S. at 449.

I have sought in the two preceding paragraphs to state what seems to me to be the dispositive difference between this case and *Frothingham*. When we turn to the reasons given in the Court's opinion for rejecting Mrs. Frothingham's suit, the difference remains clear and undiminished.

1. In disposing of *Frothingham*, the Court began by distinguishing the case from the traditional form of taxpayer's action against a municipality. The municipal taxpayer, the Court said (262 U. S. at 486), has a "direct and immediate" interest in municipal expenditures, the relationship being (p. 487) "not without some resemblance to that subsisting between stockholder and private corporation." But the taxpayer's interest in the national fisc "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Ibid.*

The quoted passages have been said to be outdated by the vastly increased impact of federal taxes and the correspondingly less "minute" share at least some taxpayers might claim in the federal as compared to municipal treasuries. 3 Davis, *Administrative Law Treatises* 244 (1958). But I do not stop to consider or to weigh such criticism

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against the unaltered position of the Supreme Court. It is quite enough for this case to repeat that plaintiffs' suit does not resemble the traditional taxpayer's suit or Mrs. Frothingham's, where the gravamen of the supposed right is nothing more than "a possible financial loss * * * by itself" from allegedly improper expenditures, *Abbott Laboratories v. Gardner, supra*, — U. S. at —. Here, the crux of the interest is found in the First Amendment, not in the supposed loss of money as such. And so it is of no moment that the amount may be "minute," that it may be in modern currency the equivalent of as little as "three pence." Cf. *Thompson v. City of Louisville*, 362 U. S. 199, 203-204 (1960). Nor is it important, whether true or not, that the amount may be to some extent "indeterminable." Nobody stopped to make the computation in *Everson* any more than the Court thought it necessary in *Baker v. Carr* for the plaintiffs to quantify the "debasement of their votes" (369 U. S. at 188, 194) in which inhered the asserted injury that gave them standing.

To hold, as I would, that plaintiffs like the ones here should be heard on their First Amendment claims would not lower in any meaningful sense the barrier against standard "taxpayers' suits" emplaced by *Frothingham*. Nobody could infer from such a holding any supposed right to roam at large as a taxpayer and test impersonally the validity of any and every federal appropriation. There may be other personal interests like the one given by the Establishment Clause where a sharply identified and cherished liberty is infringed by the uses of federal funds. If so, these would be, as they should be, bases for standing in the federal court. The vital point remains that the present case, where such an interest is urged, differs on this ground from the generalized power of supervision claimed for the taxpayer in *Frothingham*.

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2. Expanding upon its reasons for denying any general right of review for the federal taxpayer, the Court said in *Frothingham* (at 487):

“ * * * If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.”

That language does not state a ground separate from the one I have just considered, but it commands respectful attention: Read in its context, as it must be, it adds nothing to the barrier found by the majority against the suit of the present plaintiffs.

The fact that many people may share, and might sue upon, a justiciable constitutional right has never been supposed to present in itself an obstacle to suit by any of them. Cf. *Brown v. Board of Education*, 347 U. S. 483 (1954); *Baker v. Carr*, *supra*; *Seward Machine Co. v. Davis*, 301 U. S. 548 (1937). The federal courts are open, even in the face of threatened inundation, where rights far less precious are in issue.¹⁵ And we know in this time of class actions and huge litigations generally that the problem is manageable.

For a case like the present one, there is no substantial problem whatever. There may unquestionably be other actions of the same kind. In the end, however, there is likely to be only a single hearing and decision by the Supreme Court. *Stare decisis*—and, before that, the powers of the lower courts to stay or consolidate redundant actions

15. Compare the recent electrical equipment avalanche, and one of the many discussions of it in the Third Circuit Judicial Conference of last year, 39 F.R.D. 495 *et seq.*

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—will dispose of the matter with only the customary strain of adjudication for which courts sit.

3. Undoubtedly central in *Frothingham* was the principle of the separation of powers. See 262 U. S. at 488-89. This important aspect of the opinion turns, however, on considerations no different from those I have already discussed. Here, again, the vice found in Mrs. Frothingham's case was its premise that any and every action involving appropriations should automatically be reviewable at the instance of a taxpayer. It was that untenable theory to which the Court responded when it said (p. 488):

“ * * * We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.”

The test thus stated, for the reasons I have urged, is met by the plaintiffs in this case.

Of course, the delicate power of judicial review inevitably starts echoes of the separation of powers. And there are broad classes of cases, “presenting [no] justiciable issue,” where the power is absent. See *Baker v. Carr*, *supra*, 369 U. S. at 208 *et seq.* But this is not such a case. We have here “a judicial controversy” (*Frothingham* at 489) concerning a “right” most notably and centrally “within the reach of judicial protection * * *.” *Baker v. Carr*, *supra*, at 237. It should be decided on its merits.

If we were free to be concerned about the comfort of judges, there would be much to say for abstention from a subject so fraught with passions that have generated many

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bloody chapters of history. No one can read the relevant pages of the Supreme Court reports without knowing the travail it has cost to keep alive and intact the uncompromising principle of separation for which Madison and Jefferson fought. But apart from the fact that judges' case is not our subject, there is consolation of high achievement in the enterprise. Accepting cases concerned arguably with the most "negligible" of alleged breaches, the Supreme Court has labored to keep the wall of separation in sound repair. That, in history's long view, is the real gain of *Everson* and the whole body of decisions. The close divisions on the Court have not reflected anything short of essential unanimity on the principle. They have shown only that in this area of profound values, where the claims of religion and conscience must be weighed against charges of official trespass, it may be agonizing work to identify "the first experiment on our liberties."

The work has gone forward in a nearly miraculous environment of reasoned and orderly deliberation. The Court has, of course, been subjected to outpourings of the vitriol it has zealously allowed under the First Amendment. But in a nation of diversities both rich and potentially disintegrating, the domains of Church and State have lived apart and in peace. In this achievement, I think, the willingness of the Supreme Court to hear and resolve claims of incipient breaches must surely be viewed as a major factor. True religion and free conscience generally have flourished with the Court's steady enforcement of the "principle * * * that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel v. Vitale, supra*, 370 U. S. at 432.

Today's decision disserves that principle.

Marvin E. Frankel

June 19, 1967

U.S.D.J.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 4102

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

*Plaintiffs,**against*

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Defendants.

Appearances:

Leo Pfeffer, Esq.
15 East 84th Street
New York, N. Y. 10028
Attorney for plaintiffs

Joseph B. Robison, Esq.
Donald M. Kresge, Esq.
Of Counsel

Robert M. Morgenthau, United States Attorney
for the Southern District of New York
Attorney for defendants

Arthur S. Olick, Assistant United States Attorney
Michael Hess, Assistant United States Attorney
Of Counsel

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FRANKEL, D.J.

The seven plaintiffs brought this suit to enjoin the use of federal funds (1) to finance instruction in reading, arithmetic, and other subjects in religious and sectarian schools, and (2) for the purchase of textbooks and other instructional materials for use in such schools. They allege that defendants have been and are using federal funds for these purposes in administering Titles I and II of the Elementary and Secondary Education Act of 1965, 79 Stat. 27 *et seq.* (1965), 20 U.S.C. §§241a-1, 821-827 (Supp. 1966). Properly construed, plaintiffs allege, the Act does not authorize such federal expenditures. If it does, they further contend, the statute must be struck down under the First Amendment, both as a "law respecting an establishment of religion" and as a "law * * * prohibiting the free exercise thereof * * *."

The complaint asserts that plaintiffs pay federal income taxes; that they are "qualified legal voters of the United States;" that they reside and vote in New York State; that one plaintiff (Shanker) is a "real property taxpayer" in New York; and that another (Henkin) "has children regularly registered in and attending the elementary or secondary grades in the public schools of New York." Invoking the court's jurisdiction under 28 U.S.C. §§1331, 2201, 2202, 2282, and 2284, plaintiffs have moved under the last two sections for the convening of a three-judge court. Defendants have moved under Fed. R. Civ. P. 12(b) for dismissal of the complaint on the ground that plaintiffs lack standing to sue.

The parties are agreed that a three-judge court should be convened unless plaintiffs' claims under the Federal Constitution are "plainly unsubstantial." *Ex parte Poresky*, 290 U. S. 30, 32 (1933). It seems also to be agreed—

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and the court would hold, in any event—that the substantive issues plaintiffs raise under the First Amendment are not “plainly unsubstantial,” however those issues, if they are reached, may ultimately be resolved. Defendants urge, however, that the absence of standing is so clear that the action must be dismissed at this stage by a single judge. And it is common ground that the test of substantiality should be applied to the question of standing in determining whether there is basis for the calling of a three-judge court.

The able briefs on both sides focus upon the decision in *Frothingham v. Mellon*, 262 U. S. 447 (1923), where a taxpayer sought unsuccessfully to enjoin administration of the Maternity Act of 1921, claiming that the statute invaded the powers reserved to the States under the Tenth Amendment and otherwise exceeded the constitutional authority of the Congress, so that its effect was to take the taxpayer's property, “under the guise of taxation, without due process of law.” *Id.* at 480. In a brief opinion which has led since to a good deal of exegetical writing, the Supreme Court held that the interest of a taxpayer in the national fisc “is shared with millions of others; is comparatively minute and undeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court equity.” *Id.* at 487. Accordingly, the Court said, considering the separate powers of the separate branches under the Constitution, the taxpayer, as such, cannot make the showing, requisite for judicial review of a statute, “that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally,” *Id.* at 488.

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The doctrine of *Frothingham*, defendants urge, "is dispositive of this case." Their argument is a powerful one. It may well be accepted ultimately as the obligatory ground for decision at the district court level. It has lately been held by another district judge to be so clearly correct as to require dismissal of a similar suit without the summoning of a three-judge court. *Protestants and Other Americans United v. United States*, S.D. Ohio, No. 3303, March 20, 1967.¹ Nevertheless, with all deference to that Court, the claim of the present plaintiffs to standing does not appear to fall to the level of *plain* unsubstantiality warranting dismissal by a single judge.

1. Even apart from the possibly material distinctions between the First Amendment problem here and the purely economic interest asserted in *Frothingham*, that decision has been the subject of weighty criticism in the years since 1923. See, e.g., *Public Affairs Press v. Rickover*, 369 U. S. 111, 114-15 (1962) (Douglas, J., concurring); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1266, 1284 (1961); 3 Davis, *Administrative Law*, Sec. 22.09 (1958); Davis, "Judicial Control of Administrative Action": A Review, 66 Colum. L. Rev. 635, 659-69 (1966); Wright, *Federal Courts* 37 (1963). The critics have noted, among other things, that the nature of taxpayers' interests has changed as the size of the economy and government has burgeoned in the period of almost half

1. The complaint in that case, similarly attacking the Elementary and Secondary Education Act, contained a prayer on behalf of the individual plaintiffs for damages of \$5,000,000. It may be permissible to say, even at this far remove, that this grandiose novelty may have appeared to sound a somewhat bizarre note. Strictly speaking, however, the decision of the Ohio District Court goes squarely on *Frothingham*, and does not indicate that any significance was attached to the prayer for damages in reaching the conclusion that the plaintiffs patently lacked standing.

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a century since *Frothingham*. The interest of state taxpayers in the treasuries of at least several large States may be even more "remote, fluctuating and uncertain" than *Frothingham's* federal interest in 1923. Yet state taxpayers retain their standing to raise federal constitutional issues in the Supreme Court. The arguable point of this is that *Frothingham* does not announce a limitation on standing compelled by Article III of the Constitution—and, indeed, as plaintiffs stress, the decision was not expressly stated to rest upon such a mandate.

There are answers, perhaps complete ones, to that thought. But it does not seem either necessary or appropriate to pursue them to any final conclusions. The limited office of this memorandum is to sketch arguments which appear to defeat defendants' assertion of plain unsubstantiality.

2. Defendants make the point that the Senate has recently passed a bill (S. 3, 90th Cong., 1st Sess.)—identical with a bill passed by the Senate, but not the House, in the prior Congress—which would give to any federal taxpayer the right to raise in a suit for a declaratory judgment the First Amendment questions tendered here, with no "additional showing of direct or indirect financial or other injury, actual or prospective on the part of the plaintiff * * * required for the maintenance of any such action." Sec. 3(a).² "The very fact that such legislation is before the Congress," defendants argue, "demonstrates that this Court is without jurisdiction to consider the merits of the

2. Subsection (b) of Section 3 of the bill goes on to give standing far more sweepingly to "[a]ny citizen," and "citizen" is defined in subsection (c) to include a corporation. Both the taxpayer provision and the broader "citizen" subsection confer upon plaintiffs the right to bring their actions as broad class suits.

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present controversy."³ There is room for argument, however, that the Senate's action "demonstrates"—or, at least, suggests—other things.

The report on S. 3, S. Rep. No. 85, 90th Cong., 1st Sess. (1967), reflects careful study and the participation of notable scholars. It outlines not only the deliberations of the Committee on the Judiciary, but the participation in the legislative drafting of the Attorney General and the Solicitor General (*id.*, p. 2)—both, along with the Senate, bound by and sensitive to the pertinent commands of the Constitution. And it states the studied conclusion that "the *Frothingham* decision was founded on grounds other than purely constitutional ones." *Id.*, p. 4. Indeed, the passage of the bill by the Senate rests upon the weighty, if not final, judgment that this conclusion is correct. Cf. *Muskrat v. United States*, 219 U. S. 346 (1911).

As to the separation of powers, the report on S. 3 contains this interesting passage (p. 7):

"One of the initial sponsors of this legislation, Senator Wayne Morse, declared in his testimony before the subcommittee: 'I think we will greatly strengthen our whole system of three coordinate and coequal branches of government if we provide in a broad bill a jurisdictional basis for judicial review. The bill recognizes that the final power to adjudicate controversies arising under the Constitution rests in the courts rather than the Congress.'"

The report also contains material favorable to defendants' view. Considering the narrow scope of the present

3. Defendants' Reply Memorandum, p. 4.

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memorandum, there is no need to exhaust this material, but one passage should certainly be quoted (*ibid.*):

“Several cases are now pending which challenge the constitutionality of the Elementary and Secondary Education Act of 1965. The pendency of these cases may be cited by opponents of Judicial review as a substitute for legislation. The committee feels, however, that if the question of standing is raised by the defendants in these cases, they will undoubtedly be successful under the present state of the law.”

Contrary to that observation, this court is proceeding on the view that the ultimate success of defendants on the standing issue is not “undoubtedly” assured. Taking altogether the work of the Senate and its Committee on this subject, we find in it enough suggestion of plausible doubt to add weight to plaintiffs’ thesis that they have enough to justify the attentions of a three-judge court.

3. Continuing only to ask whether plaintiffs show the requisite minimum of substance, it bears mention that respectable arguments may flow from the difference in subject matter between *Frothingham* and this case, and from related differences in the asserted bases for the claim of standing. The alleged injury here is not merely, or mainly, economic loss. And the roles in which plaintiffs allege injury are not simply their roles as taxpayers. When the Founders proscribed laws “respecting an establishment of religion,” their aim, as Madison described it, was to make it impossible “to force a citizen to contribute three pence only of his property for the support of any one [church] establishment” *Memorial and Remonstrance Against Religious Assessments*, quoted in *Everson v. Board of Education*, 330 U. S. 1, 63-66 (1947) (Appendix to dissent of

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Rutledge, J.). It is banal but relevant to say that the concern was not over the three pence. The concern was with a specially cherished form of spiritual and intellectual freedom. And so it is arguable that the essentially economic analysis in *Frothingham* cannot be dispositive in a case of this kind.

It may not be unfair in ~~this~~ connection to note that defendants' argument would extend logically to the case of a federal appropriation for the building of a cathedral for some particular sect. Assuming that no taxpayer as such would have standing because of *Frothingham*, would it follow that nobody had standing to attack such an expenditure? Could it be assailed, for example, by people of different religions or no religion living in the neighborhood of the proposed structure? If it could, ~~it may~~ turn out that the allegations of the present plaintiffs concerning their interests as parents and holders of real property have weight on the standing question of a kind wholly absent from *Frothingham*.

The First Amendment forbids not only aid to religions, but actions that might "influence a person to go to or to remain away from church against his will * * *." *Everson v. Board of Education*, 330 U. S. 1, 15 (1947). It could rationally be contended that financial support of sectarian institutions may exert an impermissible "influence" upon persons outside the aided groups. The argument may not succeed in the final analysis. But it serves as a suggestion of additional grounds for claiming that the standing of the present plaintiffs is more broadly based than was the taxpayer status of Mrs. Frothingham.

4. The foregoing thoughts merely graze an enormous area that has been the subject of lengthy and difficult opin-

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ions by the Supreme Court in recent years. The general drift of First Amendment jurisprudence may plausibly be appraised as moving toward increasingly relaxed criteria for the achievement of standing to sue. See, e.g., *Abington School District v. Schempp*, 374 U. S. 203, 266 n.30 (1963) (Brennan, J., concurring); *Dombrowski v. Pfister*, 380 U. S. 479, 486-87 (1965); *Reed Enterprises v. Corcoran*, 354 F.2d 519, 523 (D. C. Cir. 1965); Kurland, "The Regents' Prayer Case," *The Supreme Court Review* (1962). This is not the time to essay a final analysis of the movement—to determine, among several questions, how far the cases attacking state action should be deemed inapposite in the federal area even though it is the "Congress" to which the First Amendment was first and literally addressed. It is enough that the potential results of such an analysis are not predictable with the certainty that would warrant dismissal of plaintiffs' action by a single judge.

Accordingly, the motion to convene a three-judge court will be granted, and the matter will be referred to the Chief Judge of this Circuit for that purpose. Defendants' motion to dismiss will be held for the decision of the three-judge court.

It is so ordered.

Dated: New York, New York
April 27, 1967

MARVIN E. FRANKEL

U.S.D.J.

APPENDIX C

Excerpts from Elementary and Secondary Education Act of 1965

Title I—Financial Assistance to Local Educational Agencies for the Education of Children of Low- Income Families and Extension of Public Law 874, Eighty-First Congress

SEC. 2. The Act of September 30, 1950, Public Law 874, Eighty-first Congress, as amended (20 U.S.C. 236-244), is amended by inserting:

"Title I—Financial Assistance for Local Educational Agencies in Areas Affected by Federal Activity"

immediately above the heading of section 1, by striking out "this Act" wherever it appears in sections 1 through 6, inclusive (other than where it appears in clause (B) of section 4(a)), and inserting in lieu thereof "this title", and by adding immediately after section 6 the following new title:

"Title II—Financial Assistance to Local Educational Agencies for the Education of Children of Low-Income Families

"DECLARATION OF POLICY

"SEC. 201. In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in this title) to local educational agencies serving areas with concentrations of children from low-income

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families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

"KINDS AND DURATION OF GRANTS

"SEC. 202. The Commissioner shall, in accordance with the provisions of this title, make payments to State educational agencies for basic grants to local educational agencies for the period beginning July 1, 1965, and ending June 30, 1968, and he shall make payments to State educational agencies for special incentive grants to local educational agencies for the period beginning July 1, 1966, and ending June 30, 1968.

"BASIC GRANTS—AMOUNT AND ELIGIBILITY

"SEC. 203. (a)(1) From the sums appropriated for making basic grants under this title for a fiscal year, the Commissioner shall reserve such amount, but not in excess of 2 per centum thereof, as he may determine and shall allot such amount among Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands according to their respective need for such grants. The maximum basic grant which a local educational agency in Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands shall be eligible to receive shall be determined pursuant to such criteria as the Commissioner determines will best carry out the purposes of this title.

"(2) In any case in which the Commissioner determines that satisfactory data for that purpose are available, the maximum basic grant which a local educational agency in a State shall be eligible to receive under this title for any fiscal year shall be (except as provided in paragraph (3))

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an amount equal to the Federal percentage (established pursuant to subsection (c)) of the average per pupil expenditure in that State multiplied by the sum of (A) the number of children aged five to seventeen, inclusive, in the school district of such agency, of families having an annual income of less than the low-income factor (established pursuant to subsection (c)), and (B) the number of children of such ages in such school district of families receiving an annual income in excess of the low-income factor (as established pursuant to subsection (c)) from payments under the program of aid to families with dependent children under a State plan approved under title IV of the Social Security Act. In any other case, the maximum basic grant for any local educational agency in a State shall be determined on the basis of the aggregate maximum amount of such grants for all such agencies in the county or counties in which the school district of the particular agency is located, which aggregate maximum amount shall be equal to the Federal percentage of such per pupil expenditure multiplied by the number of children of such ages and families in such county or counties and shall be allocated among those agencies upon such equitable basis as may be determined by the State educational agency in accordance with basic criteria prescribed by the Commissioner. For purposes of this subsection the 'average per pupil expenditure' in a State shall be the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made, of all local educational agencies in the State (without regard to the sources of funds from which such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year. In determining the maximum amount of a basic grant and the eligibility of a local educational agency for a basic grant for any fiscal year, the num-

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ber of children determined under the first two sentences of this subsection or under subsection (b) shall be reduced by the number of children aged five to seventeen, inclusive, of families having an annual income of less than the low-income factor (as established pursuant to subsection (c)) for whom a payment was made under title I for the previous fiscal year.

“(3) If the maximum amount of the basic grant determined pursuant to paragraph (1) or (2) for any local educational agency for the fiscal year ending June 30, 1966, is greater than 30 per centum of the sum budgeted by that agency for current expenditures for that year (as determined pursuant to regulations of the Commissioner), such maximum amount shall be reduced to 30 per centum of such budgeted sum.

“(4) For purposes of this subsection, the term ‘State’ does not include Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

“(b) A local educational agency shall be eligible for a basic grant for a fiscal year under this title only if it meets the following requirements with respect to the number of children aged five to seventeen, inclusive, of families having an annual income of less than the low-income factor (as established pursuant to subsection (c)):

“(1) In any case (except as provided in paragraph (3)) in which the Commissioner determines that satisfactory data for the purpose of this subsection as to the number of such children of such families are available on a school district basis, the number of such children of such families in the school district of such local educational agency shall be—

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“(A) at least one hundred, or

“(B) equal to 3 per centum or more of the total number of all children aged five to seventeen, inclusive, in such district,

whichever is less, except that it shall in no case be less than ten.

“(2) In any other case, except as provided in paragraph (3), the number of children of such ages of families with such income in the county which includes such local educational agency's school district shall be one hundred or more.

“(3) In any case in which a county includes a part of the school district of the local educational agency concerned and the Commissioner has not determined that satisfactory data for the purpose of this subsection are available on a school district basis for all the local educational agencies for all the counties into which the school district of the local educational agency concerned extends, the eligibility requirement with respect to the number of children of such ages of families of such income for such local educational agency shall be determined in accordance with regulations prescribed by the Commissioner for the purposes of this subsection.

“(c) For the purposes of this section, the ‘Federal percentage’ and the ‘low-income factor’ for the fiscal year ending June 30, 1966, shall be 50 per centum and \$2,000 respectively. For each of the two succeeding fiscal years the Federal percentage and the low-income factor shall be established by the Congress by law.

“(d) For the purposes of this section, the Commissioner shall determine the number of children aged five to seven-

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teen, inclusive, of families having an annual income of less than the low-income factor (as established pursuant to subsection (c)) on the basis of the most recent satisfactory data available from the Department of Commerce. At any time such data for a county are available in the Department of Commerce, such data shall be used in making calculations under this section. The Secretary of Health, Education and Welfare shall determine the number of children of such ages from families receiving an annual income in excess of the low-income factor (established pursuant to subsection (c)) from payments under the program of aid to families with dependent children under a State plan approved under title IV of the Social Security Act on the basis of the best available data for the period most nearly comparable to those which are used by the Commissioner under the first two sentences of this subsection in making determinations for the purposes of subsections (a) and (b). When requested by the Commissioner, the Secretary of Commerce shall make a special estimate of the number of children of such ages who are from families having an annual income less than the low-income factor (established pursuant to subsection (c)) in each county or school district, and the Commissioner is authorized to pay (either in advance or by way of reimbursement) the Secretary of Commerce the cost of making this special estimate. The Secretary of Commerce shall give consideration to any request of the chief executive of a State for the collection of additional census information.

"SPECIAL INCENTIVE GRANTS

"SEC. 204. Each local educational agency which is eligible to receive a basic grant for the fiscal year ending June 30, 1967, shall be eligible to receive in addition a special incentive grant which does not exceed the product of (a) the aggregate number of children in average daily attend-

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ance to whom such agency provided free public education during the fiscal year ending June 30, 1965, and (b) the amount by which the average per pupil expenditure of that agency for the fiscal year ending June 30, 1965, exceeded 105 per centum of such expenditure for the fiscal year ending June 30, 1964. Each local educational agency which is eligible to receive a basic grant for the fiscal year ending June 30, 1968, shall be eligible to receive in addition a special incentive grant which does not exceed the product of (c) the aggregate number of children in average daily attendance to whom such agency provided free public education during the fiscal year ending June 30, 1966, and (d) the amount by which the average per pupil expenditure of that agency for the fiscal year ending June 30, 1966, exceeded 110 per centum of such expenditure for the fiscal year ending June 30, 1964. For the purpose of this section the 'average per pupil expenditure' of a local educational agency for any year shall be the aggregate expenditures (without regard to the sources of funds from which such expenditures are made, except that funds derived from Federal sources shall not be used in computing such expenditures) from current revenues made by that agency during that year for free public education, divided by the aggregate number of children in average daily attendance to whom such agency provided free public education during that year.

"APPLICATION

"SEC. 205. (a) A local educational agency may receive a basic grant or a special incentive grant under this title for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—

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"(1) that payments under this title will be used for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting those needs, and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly operated programs and projects under this title;

"(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;

"(3) that the local educational agency has provided satisfactory assurance that the control of funds provided under this title, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this title, and that a public agency will administer such funds and property;

"(4) in the case of any project for construction of school facilities, that the project is not inconsistent with overall State plans for the construction of school facilities and that the requirements of section 209 will be complied with on all such construction projects;

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"(5) that effective procedures, including provision for appropriate objective measurements of educational achievement, will be adopted for evaluating at least annually the effectiveness of the programs in meeting the special educational needs of educationally deprived children;

"(6) that the local educational agency will make an annual report and such other reports to the State educational agency, in such form and containing such information, as may be reasonably necessary to enable the State educational agency to perform its duties under this title, including information relating to the educational achievement of students participating in programs carried out under this title, and will keep such records and afford such access thereto as the State educational agency may find necessary to assure the correctness and verification of such reports;

"(7) that wherever there is, in the area served by the local educational agency, a community action program approved pursuant to title II of the Economic Opportunity Act of 1964 (Public Law 88-452), the programs and projects have been developed in cooperation with the public or private nonprofit agency responsible for the community action program; and

"(8) that effective procedures will be adopted for acquiring and disseminating to teachers and administrators significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices developed through such projects.

"(b) The State educational agency shall not finally disapprove in whole or in part any application for funds under this title without first affording the local educational agency submitting the application reasonable notice and opportunity for a hearing.

*Appendix C**"ASSURANCES FROM STATES*

"SEC. 206. (a) Any State desiring to participate in the program of this title shall submit through its State educational agency to the Commissioner an application, in such detail as the Commissioner deems necessary, which provides satisfactory assurance—

"(1) that, except as provided in section 207(b), payments under this title will be used only for programs and projects which have been approved by the State educational agency pursuant to section 205(a) and which meet the requirements of that section, and that such agency will in all other respects comply with the provisions of this title, including the enforcement of any obligations imposed upon a local educational agency under section 205(a);

"(2) that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid to the State (including such funds paid by the State to local educational agencies) under this title; and

"(3) that the State educational agency will make to the Commissioner (A) periodic reports (including the results of objective measurements required by section 205(a)(5)) evaluating the effectiveness of payments under this title and of particular programs assisted under it in improving the educational attainment of educationally deprived children, and (B) such other reports as may be reasonably necessary to enable the Commissioner to perform his duties under this title (including such reports as he may require to determine the amounts which the local educational agencies of that State are eligible to receive for any fiscal year), and assurance that such agency will keep such records

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and afford such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports.

“(b) The Commissioner shall approve an application which meets the requirements specified in subsection (a), and he shall not finally disapprove an application except after reasonable notice and opportunity for a hearing to the State educational agency.”

“PAYMENT

“SEC. 207. (a)(1) The Commissioner shall, subject to the provisions of section 208, from time to time pay to each State, in advance or otherwise, the amount which the local educational agencies of that State are eligible to receive under this title. Such payments shall take into account the extent (if any) to which any previous payment to such State educational agency under this title (whether or not in the same fiscal year) was greater or less than the amount which should have been paid to it.

“(2) From the funds paid to it pursuant to paragraph (1) each State educational agency shall distribute to each local educational agency of the State which is not ineligible by reason of section 203(b) and which has submitted an application approved pursuant to section 205(a) the amount for which such application has been approved, except that this amount shall not exceed an amount equal to the total of the maximum amount of the basic grant plus the maximum amount of the special incentive grant as determined for that agency pursuant to sections 203 and 204, respectively.

“(b) The Commissioner is authorized to pay to each State amounts equal to the amounts expended by it for the

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proper and efficient performance of its duties under this title (including technical assistance for the measurements and evaluations required by section 205(a)(5)), except that the total of such payments in any fiscal year shall not exceed 1 per centum of the total of the amount of the basic grants paid under this title for that year to the local educational agencies of the State.

"(c) (1) No payments shall be made under this title for any fiscal year to a State which has taken into consideration payments under this title in determining the eligibility of any local educational agency in that State for State aid, or the amount of that aid, with respect to the free public education of children during that year or the preceding fiscal year.

"(2) No payments shall be made under this title to any local educational agency for any fiscal year unless the State educational agency finds that the combined fiscal effort (as determined in accordance with regulations of the Commissioner) of that agency and the State with respect to the provision of free public education by that agency for the preceding fiscal year was not less than such combined fiscal effort for that purpose for the fiscal year ending June 30, 1964.

"ADJUSTMENTS WHERE NECESSITATED BY APPROPRIATIONS

"SEC. 208. If the sums appropriated for the fiscal year ending June 30, 1966, for making the payments provided in this title are not sufficient to pay in full the total amounts which all local and State educational agencies are eligible to receive under this title for such year, such amounts shall be reduced ratably. In case additional funds become available for making payments under this title for that year, such reduced amounts shall be increased on the same basis that they were reduced.

*Appendix C***"LABOR STANDARDS**

"SEC. 209. All laborers and mechanics employed by contractors or subcontractors on all construction projects assisted under this title shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a—276a-5). The Secretary of Labor shall have with respect to the labor standards specified in this section the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 5 U.S.C. 133z-15) and section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 276c).

"WITHHOLDING

"SEC. 210. Whenever the Commissioner, after reasonable notice and opportunity for hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 206(b), the Commissioner shall notify the agency that further payments will not be made to the State under this title (or, in his discretion, that the State educational agency shall not make further payments under this title to specified local educational agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, no further payments shall be made to the State under this title, or payments by the State educational agency under this title shall be limited to local educational agencies not affected by the failure, as the case may be.

"JUDICIAL REVIEW

"SEC. 211. (a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its application submitted under section 206(a) or with

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his final action under section 210, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

“(b) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

“(c) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

“NATIONAL ADVISORY COUNCIL

“SEC. 212. (a) The President shall, within ninety days after the enactment of this title, appoint a National Advisory Council on the Education of Disadvantaged Children for the purpose of reviewing the administration and operation of this title, including its effectiveness in improving the educational attainment of educationally deprived children, and making recommendations for the improvement of

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this title and its administration and operation. These recommendations shall take into consideration experience gained under this and other Federal educational programs for disadvantaged children and, to the extent appropriate, experience gained under other public and private educational programs for disadvantaged children.

“(b) The Council shall be appointed by the President without regard to the civil service laws and shall consist of twelve persons. When requested by the President, the Secretary of Health, Education, and Welfare shall engage such technical assistance as may be required to carry out the functions of the Council, and the Secretary shall make available to the Council such secretarial, clerical, and other assistance and such pertinent data prepared by the Department of Health, Education, and Welfare as it may require to carry out such functions.

“(c) The Council shall make an annual report of its findings and recommendations (including recommendations for changes in the provisions of this title) to the President not later than March 31 of each calendar year beginning after the enactment of this title. The President shall transmit each such report to the Congress together with his comments and recommendations.

“(d) Members of the Council who are not regular full-time employees of the United States shall, while serving on business of the Council, be entitled to receive compensation at rates fixed by the President, but not exceeding \$100 per day, including travel time; and while so serving away from their homes or regular places of business, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5 of the Administrative Expenses Act of 1946 (5 U.S.C. 73b-2) for persons in Government service employed intermittently.”

* * *

*Appendix C***Title II—School Library Resources, Textbooks, and Other Instructional Materials****APPROPRIATIONS AUTHORIZED**

SEC. 201. (a) The Commissioner shall carry out during the fiscal year ending June 30, 1966, and each of the four succeeding fiscal years, a program for making grants for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools.

(b) For the purpose of making grants under this title, there is hereby authorized to be appropriated the sum of \$100,000,000 for the fiscal year ending June 30, 1966; but for the fiscal year ending June 30, 1967, and the three succeeding fiscal years, only such sums may be appropriated as the Congress may hereafter authorize by law.

ALLOTMENT TO STATES

SEC. 202. (a) From the sums appropriated for carrying out this title for any fiscal year, the Commissioner shall reserve such amount, but not in excess of 2 per centum thereof, as he may determine and shall allot such amount among the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands according to their respective needs for assistance under this title. From the remainder of such sums, the Commissioner shall allot to each State an amount which bears the same ratio to such remainder as the number of children enrolled in the public and private elementary and secondary schools of that State bears to the total number of children enrolled in such schools in all of the States. The number of children so enrolled shall be determined by

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the Commissioner on the basis of the most recent satisfactory data available to him. For purposes of this subsection, the term "State" shall not include the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) The amount of any State's allotment under subsection (a) for any fiscal year which the Commissioner determines will not be required for such fiscal year shall be available for reallocation from time to time, on such dates during such year as the Commissioner may fix, to other States in proportion to the original allotments to such States under subsection (a) for that year but with such proportionate amount for any of such other States being reduced to the extent it exceeds the sum the Commissioner estimates such State needs and will be able to use for such year; and the total of such reductions shall be similarly reallocated among the States whose proportionate amounts were not so reduced. Any amount reallocated to a State under this subsection during a year from funds appropriated pursuant to section 201 shall be deemed part of its allotment under section (a) for such year.

STATE PLANS

SEC. 203. (a) Any State which desires to receive grants under this title shall submit to the Commissioner a State plan, in such detail as the Commissioner deems necessary, which—

(1) designates a State agency which shall, either directly or through arrangements with other State or local public agencies, act as the sole agency for administration of the State plan;

(2) sets forth a program under which funds paid to the State from its allotment under section 202 will

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be expended solely for (A) acquisition of library resources (which for the purposes of this title means books, periodicals, documents, audio-visual materials, and other related library materials), textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools in the State, and (B) administration of the State plan, including the development and revision of standards relating to library resources, textbooks, and other printed and published instructional materials furnished for the use of children and teachers in the public elementary and secondary schools of the State, except that the amount used for administration of the State plan shall not exceed for the fiscal year ending June 30, 1966, an amount equal to 5 per centum of the amount paid to the State under this title for that year, and for any fiscal year thereafter an amount equal to 3 per centum of the amount paid to the State under this title for that year;

(3) sets forth the criteria to be used in allocating library resources, textbooks, and other printed and published instructional materials provided under this title among the children and teachers of the State, which criteria shall—

(A) take into consideration the relative need of the children and teachers of the State for such library resources, textbooks, or other instructional materials, and

(B) provide assurance that to the extent consistent with law such library resources, textbooks, and other instructional materials will be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools in the State which comply with the compulsory attend-

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ance laws of the State or are otherwise recognized by it through some procedure customarily used in the State;

(4) sets forth the criteria to be used in selecting the library resources, textbooks, and other instructional materials to be provided under this title and for determining the proportions of the State's allotment for each fiscal year which will be expended for library resources, textbooks, and other printed and published instructional materials, respectively, and the terms by which such library resources, textbooks, and other instructional materials will be made available for the use of children and teachers in the schools of the State;

(5) sets forth policies and procedures designed to assure that Federal funds made available under this title for any fiscal year will be so used as to supplement and, to the extent practical, increase the level of State, local, and private school funds that would in the absence of such Federal funds be made available for library resources, textbooks, and other printed and published instructional materials, and in no case supplant such State, local and private school funds;

(6) sets forth such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid to the State (including any such funds paid by the State to any other public agency) under this title; and

(7) provides for making such reports, in such form and containing such information, as the Commissioner may reasonably require to carry out his functions under this title, and for keeping such records and for affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports.

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(b) The Commissioner shall approve any State plan and any modification thereof which complies with the provisions of subsection (a).

PAYMENTS TO STATES

SEC. 204. (a) From the amounts allotted to each State under section 202 the Commissioner shall pay to that State an amount equal to the amount expended by the State in carrying out its State plan. Such payments may be made in installments, and in advance or by way of reimbursement, with necessary adjustments on account of overpayments or underpayments.

(b) In any State which has a State plan approved under section 203(b) and in which no State agency is authorized by law to provide library resources, textbooks, or other printed and published instructional materials for the use of children and teachers in any one or more elementary or secondary schools in such State, the Commissioner shall arrange for the provision on an equitable basis of such library resources, textbooks, or other instructional materials for such use and shall pay the cost thereof for any fiscal year ending prior to July 1, 1970, out of that State's allotment.

PUBLIC CONTROL OF LIBRARY RESOURCES, TEXTBOOKS, AND OTHER INSTRUCTIONAL MATERIAL AND TYPES WHICH MAY BE MADE AVAILABLE

SEC. 205. (a) Title to library resources, textbooks, and other printed and published instructional materials furnished pursuant to this title, and control and administration of their use, shall vest only in a public agency.

(b) The library resources, textbooks, and other printed and published instructional materials made available pur-

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suant to this title for use of children and teachers in any school in any State shall be limited to those which have been approved by an appropriate State or local educational authority or agency for use, or are used, in a public elementary or secondary school of that State.

ADMINISTRATION OF STATE PLANS

SEC. 206. (a) The Commissioner shall not finally disapprove any State plan submitted under this title, or any modification thereof, without first affording the State agency administering the plan reasonable notice and opportunity for a hearing.

(b) Whenever the Commissioner, after reasonable notice and opportunity for hearing to such State agency, finds—

(1) that the State plan has been so changed that it no longer complies with the provisions of section 203 (a), or

(2) that in the administration of the plan there is a failure to comply substantially with any such provisions,

the Commissioner shall notify such State agency that the State will not be regarded as eligible to participate in the program under this title until he is satisfied that there is no longer any such failure to comply.

JUDICIAL REVIEW

SEC. 207. (a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its State plan submitted under section 203(a) or with his final action under section 206(b), such State may, within sixty days after notice of such action, file with the United States

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court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

(b) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) The court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

SUPREME COURT, U. S.

FILED

SEP 7 1967

JOHN F. DAVIS, CLERK

No. 416

In the Supreme Court of the United States

OCTOBER TERM, 1967

FLORENCE FLAST, ET AL., APPELLANTS,

v.

JOHN W. GARDNER, AS SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

MOTION TO DISMISS OR AFFIRM

RALPH S. SPRITZER,

Acting Solicitor General,

Department of Justice,

Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

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FLORENCE FLAST, ET AL., APPELLANTS

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JOHN W. GARDNER, AS SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move to dismiss this appeal or, in the alternative, to affirm the judgment of the district court.

STATEMENT

This is a direct appeal, under 28 U.S.C. 1253, from a decision of a three-judge district court (J.S. App. 11-46; 267 F. Supp. 351) dismissing the complaint herein for lack of jurisdiction of the subject matter (J.S. App. 18). The complaint prayed for an injunction restraining appellees from "approving any program for the expenditure of Federal funds to finance * * * instruction or guidance services in religious and

sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools.”¹ The complaint alleged that in administering Titles I and II of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241a *et seq.*, 821 *et seq.* (Supp. I, 1965)), appellees are approving such programs in violation of the First Amendment. Appellants are alleged to be citizens and taxpayers of the United States and the State of New York.

The three-judge district court, with one dissent, held that appellants have no standing as federal taxpayers to contest the expenditure of federal funds, under this Court’s decision in *Frothingham v. Mellon*, 262 U.S. 447. The dissenting judge urged that *Frothingham v. Mellon* is inapplicable to a suit contesting federal expenditures as violative of the Establishment Clause of the First Amendment.

Under Title I of the Elementary and Secondary Education Act, federal grants to local educational agencies are authorized when the local agency presents an application which the appropriate State educational agency determines to meet the various criteria set forth in the Act. 20 U.S.C. 241e (Supp. I, 1965). The local agency’s plan must be designed “to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families.” *Ibid.* Title II of the Act authorizes federal grants to States which submit plans meeting various criteria set

¹ For the convenience of the Court, we set forth the text of the complaint as an appendix hereto (*infra*, pp. 9-14).

forth in the Act. 20 U.S.C. 823 (Supp. I, 1965). State programs under Title II must be designed to acquire library resources and other instructional materials for use in public and private elementary and secondary schools. *Ibid.*

ARGUMENT

The sole question presented on this appeal (see J.S. 3) is whether the operation of a federal program of aid to education may be enjoined, on the ground that it violates the Establishment and Free Exercise clauses of the First Amendment, at the suit of plaintiffs who allege no connection with that program other than that they are citizens and taxpayers of the United States.

We submit that the court below correctly held that this case is governed by *Frothingham v. Mellon*, 262 U.S. 447. In that case a taxpayer sought to enjoin federal appropriations to combat maternal and infant mortality under the Maternity Act of 1921, contending that that Act usurped powers reserved to the States by the Tenth Amendment. This Court held unanimously that a federal taxpayer, as such, lacks standing to obtain judicial review of a federal statute because he cannot show that "he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." 262 U.S. at 488.

The principle of *Frothingham* is fully applicable to cases involving the Establishment Clause of the First

Amendment. *Doremus v. Board of Education*, 342 U.S. 429. To be sure, as the dissenting opinion below points out, one purpose of the Establishment Clause was to protect citizens from taxation to support a church. But under a Constitution that established a government of limited and enumerated powers, virtually every claim that the prescribed bounds have been exceeded may be accompanied by the assertion that tax revenues are being put to an impermissible use. The critical consideration here, as in *Frothingham*, is that appellants can allege no more than that they suffer "in some indefinite way in common with people generally." 262 U.S. at 448.

Surely the fact that constitutional rights are asserted here cannot relieve appellants from the necessity of demonstrating an interest less "indeterminable, remote, uncertain and indirect" than that of a taxpayer in the moneys of the federal treasury. *Doremus v. Board of Education*, 342 U.S. at 433. Indeed, strict compliance with jurisdictional requirements is especially important where the suit seeks to invalidate a federal statute on constitutional grounds. "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (concurring opinion of Brandeis, J.); *Blair v. United States*, 250 U.S. 273, 279.

In prior cases involving the question of whether

school programs violated the Establishment or Free Exercise Clauses of the First Amendment, the plaintiffs were either taxpayers of a local school district, or the parents of affected school children. *Abington School District v. Schempp*, 374 U.S. 203; *Engel v. Vitale*, 370 U.S. 421; *Zorach v. Clauson*, 343 U.S. 306; *McCollum v. Board of Education*, 333 U.S. 203; *Everson v. Board of Education*, 330 U.S. 1. Thus in each case this Court could consider the constitutional questions raised in the context of a particular program as it operated in a particular school district.

By contrast, petitioners here seek a broad ruling as to all federal grants under Titles I and II of the Elementary and Secondary Education Act. The Act provides for federal financing of local or State programs; such programs do not have to be uniform from State to State or district to district, so long as they meet the standards of the Act and the regulations thereunder. 20 U.S.C. 241e, 823 (Supp. I, 1965); 45 C.F.R. 116.16 *et seq.*; 117.2 *et seq.*² Indeed, appellants allege

² The Senate committee report on the Act lists 49 possible types of programs that could be financed under Title I, and states that the list was not intended to be exhaustive. Sen. Rept. No. 146, 89th Cong., 1st. Sess., at 10-11. The Senate report also evidences the congressional expectation "that State plans regarding the administration of [Title II] programs will vary from State to State." *Id.* at 23. In particular, the committee suggested that some States might wish to establish "a central public depository within a school district or within an area to serve more than one school district from which all elementary and secondary schoolchildren and teachers could 'check out' library resources" (*ibid.*). It seems likely that such a program would raise fewer constitutional doubts, if any, than a program by which school books were placed in the libraries of church-operated schools. Compare *Zorach v. Clauson*, *supra*, with *McCollum v. Board of Education*, *supra*.

that there are many programs which would qualify for assistance under Title I of the Act without any constitutional infirmity and that the Board of Education of New York City has in fact adopted such programs. (Complaint, paras. 9-11). Nevertheless, the complaint is not addressed to any specific program either adopted or proposed. The complaint does not allege that any particular local agency, any place in the country, has or may present an unconstitutional program. In these circumstances, it seems evident that appellants seek to have an act of Congress declared unconstitutional in the abstract rather than with reference to an identified injury flowing from a particularized set of facts in a determinate context. But that is precisely the sort of adjudication which this Court has consistently declined to undertake.

Many decisions of this Court indicate that the varying details of programs approved under the Act could well be of critical significance from a constitutional standpoint.³ But absent a detailed consideration of each and every State and local program submitted for approval under Titles I and II of the Act, appellants' complaint could be adjudicated only by a broad and hypothetical declaration as to what possible types of programs qualifying for assistance under the Act would or would not be constitutionally permissible. In short, by failing to attack a specific program

³ See *Zorach v. Clauson*, 343 U.S. 306; *McCullum v. Board of Education*, 333 U.S. 203; *Everson v. Board of Education*, 330 U.S. 1. See also opinion of Frankfurter, J. in *McCullum v. Board of Education*, 333 U.S. 203, 226, stressing the importance of "detailed analysis of the facts to which the Constitutional test of Separation is to be applied."

as it impinges on them in a specified fashion, appellants have failed to satisfy the primary object of the standing requirement: to insure the presentation of issues in a concrete and sharply focussed factual context. See *Baker v. Carr*, 369 U.S. 186, 204.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the decision of the district court should be affirmed.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967.

APPENDIX

In the United States District Court for the Southern District of New York

COMPLAINT

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN
AND HELEN D. BUTTENWIESER, PLAINTIFFS,

v.

JOHN W. GARDNER, AS SECRETARY OF THE DEPARTMENT
OF HEALTH, EDUCATION AND WELFARE OF THE UNITED
STATES, AND HAROLD HOWE, 2D, AS COMMISSIONER OF
EDUCATION OF THE UNITED STATES, DEFENDANTS.

I. STATEMENT AS TO JURISDICTION

1. This is a civil action brought by the plaintiffs, on their own behalf and on behalf of all other similarly situated, for a temporary and permanent injunction against the allocation and use of the funds of the United States to finance, in whole or in part, instruction in sectarian schools, and to declare such use violative of the First and Fifth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 42, U.S. Code, Sections 1331, 2282, 2284, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand (\$10,000) Dollars, as more fully appears hereinafter.

4. Plaintiffs are each citizens of the United States

and of the State of New York. Plaintiffs each pay income taxes to the United States and are each qualified legal voters of the United States. Plaintiffs are also each residents of and legal voters in the State of New York, and plaintiff Albert Shanker is a real property taxpayer in the State of New York. Plaintiff Helen D. Henkin has children regularly registered in and attending the elementary or secondary grades in the public schools of New York.

5. Defendant John W. Gardner is Secretary of the United States Department of Health, Education and Welfare and is sued herein in that capacity. Defendant Harold Howe, 2d, is the Commissioner of Education of the United States and is sued herein in that capacity.

II. FACTUAL ALLEGATIONS

6. In 1965, the Congress of the United States enacted and, on April 11, 1965, the President of the United States approved P.L. 89-10, known as the Elementary and Secondary Education Act of 1965, Title I whereof authorizes Federal financial support for special educational programs for educationally deprived children in attendance areas where low income families are concentrated. Section 205(2)(2) of the Act provides that, in order for a local educational agency to qualify for support from the Federal Government under such Title I, it must appear "that to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who attend non-public schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services) in which children can participate without full-time public school attendance."

7. The Elementary and Secondary Education Act of 1965 authorizes, empowers and requires the defendant Harold Howe, 2d, in his capacity as Commissioner of Education, to pass upon all applications for Federal funds to finance programs under the Act and to withhold approval from any program which does not comply with the terms, conditions and limitations of the Act.

8. It was not the intent of Congress in enacting Title I, Section 205(a)(2) to require local educational agencies, in order to qualify for Federal funds, to violate the prohibitions of the First Amendment to the United States Constitution, but that local educational agencies could qualify for Federal funds by providing programs within the limitations of the Federal Constitution.

9. There are many programs within the meaning of Title I of the Elementary and Secondary Education Act of 1965 which could practicably be instituted by local educational agencies which would qualify them for the receipt of Federal funds under the Act but which would not violate the provisions of the Federal Constitution. Among these programs are those to provide pupil health and dental benefits in public and nonpublic schools, and programs for special instruction in courses such as reading, arithmetic, music and art and for guidance conducted on publicly owned premises after regular school hours and open equally to children regularly registered in public and nonpublic schools.

10. On information and belief, the Board of Education of the City of New York, a local educational agency, has in fact instituted and continues to institute and conduct programs such as these and has on the basis thereof in fact qualified for and received

Federal funds under Title I. of the Elementary and Secondary Education Act of 1965.

11. On information and belief, it is feasible and practicable for the Board of Education of the City of New York to expand these constitutional programs and institute other constitutional programs and thereby qualify for and receive all the Federal funds to which it is entitled under the terms of the Elementary and Secondary Education Act of 1965.

12. On information and belief, the defendant Harold Howe, 2d, by and with the consent and approval of defendant John W. Gardner, has in the past and, unless enjoined by this Court, will in the future approve programs whereunder substantial sums of Federal funds, greatly in excess of Ten Thousand (\$10,000) Dollars, allocated under Title I of the Elementary and Secondary Education Act of 1965 will be used to finance, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools.

13. On information and belief, large sums of Federal funds; the exact amounts whereof are not known to the plaintiffs, have been and continue to be used and, unless enjoined by this Court, will continue to be used to finance and aid, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in sectarian or religious schools.

14. Title II of the Elementary and Secondary Education Act of 1965 authorizes Federal financial support for the purchase of textbooks and instructional and library materials for use in elementary and secondary schools.

15. On information and belief, large sums of Federal funds, greatly in excess of Ten Thousand (\$10,000) Dollars, the exact amounts whereof are not known to the plaintiffs, with the consent and approval

of the defendants, have been and continue to be used and, unless enjoined by this Court, will continue to be used, to finance the purchase of textbooks and instructional and library materials for use in religious and sectarian schools.

III. CAUSES OF ACTION

16. *First Count.*—The determination and action of the defendants violate the First Amendment to the United States Constitution in that they constitute a law respecting an establishment of religion by reason of the fact that they effect a contribution of tax raised funds to the support of institutions which teach the tenets of a church and constitute governmental financing of religious groups and governmental action whose purpose and primary effect is to advance religion.

17. *Second Count.*—The determination and action of the defendants violate the First Amendment to the United States Constitution in that they prohibit the free exercise of religion on the part of the plaintiffs and the class they represent by reason of the fact that they constitute compulsory taxation for religious purposes.

IV. OTHER ALLEGATIONS

18. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

19. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

V. PRAYERS FOR RELIEF

20. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2282 and 2284 of the U.S. Code to declare unconstitutional the determination and action of the defendants as hereinbefore set forth.

(2) That the court adjudge and declare that the determination and action of the defendants as hereinbefore set forth is not authorized or intended by the Elementary and Secondary Education Act of 1965, or in the alternative if such determination and action are within the authority and intent of the Act, the Act is to that extent unconstitutional and void.

(3) That the defendants and each of them be enjoined from approving any program for the expenditure of Federal funds to finance in whole or in part instruction or guidance services in religious and sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools.

(4) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief set forth herein.

(5) That the plaintiffs be granted such other and further relief as to the Court may seem just and proper.

LEO PFEFFER,
Attorney for Plaintiffs.

DECEMBER 1, 1966.

SUPREME COURT, D. C.

Supreme Court, U.S.

FILED

IN THE

SEP 20 1967

Supreme Court of the United States

JOHN F. DWYER, CLERK

October Term, 1967

No. 416

**FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,**

Appellants,

against

**JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,**

Appellees.

REPLY TO MOTION TO DISMISS OR AFFIRM

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REPLY TO MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellants submit this reply to the appellees' motion to dismiss or affirm.

This reply is addressed solely to the assertion, on pages 5-7 of appellees' motion, that the appellants "seek a broad ruling as to all Federal grants under Titles I and II of the Elementary and Secondary Education Act," and that

"[t]he complaint does not allege that any particular local agency, any place in the country, has or may present an unconstitutional program." Appellees conclude that appellants are asking this Court to consider "each and every State and local program submitted for approval under Titles I and II."

1. The above argument misconstrues the factual issues upon which the three-judge district court, on May 25, 1967, heard defendants' motion to dismiss. On May 10, 1967, some two weeks before oral argument of defendants' motion, all parties to this lawsuit were present at a pre-trial conference held by District Judge Marvin E. Frankel. Among other things, Judge Frankel sought to limit the factual issues in order to facilitate a trial. At the conference, the attorney for the plaintiffs agreed to limit the complaint so that the only issue before the three-judge court would be the constitutionality of Title I and Title II as these titles had been construed and applied by defendants to certain educational programs now in effect in New York City. Judge Frankel agreed that this was a desirable and fair way to limit the litigation, and from that time on the case was posited on the assumption that only Title I and II programs existing in New York City were under consideration. Specific reference was made to the practices of sending teachers paid out of Federal funds to teach in the New York City parochial schools and supplying textbooks for use in those schools.

In oral argument before the three-judge court, the plaintiffs again stressed they were limiting their constitutional attack to certain programs now existing in New York City.

Mr. Pfeffer, attorney for the plaintiffs, said this before the court:

If your Honor please, I am perfectly willing that this case be deemed a case against the City of New York, the Board of Education. The District of Columbia didn't defend that suit [*Bradfield v. Roberts*]. It was the government of the United States, Attorney General of the United States, not the attorney of the District of Columbia. If it will be necessary to paint this case in the same picture, I am perfectly willing.

Even if it is necessary that jurisdiction be dependent upon making the City of New York a defendant in this case we are perfectly willing to do so.*

2. On a motion to dismiss, the complaint must be taken in its most favorable light. As this Court said in *Conley v. Gibson*, 355 U. S. 41, 45-46, 48 (1957) ::

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

* * *

Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. (Footnotes omitted.)

The appellants were at all times willing to amend their complaint if that were necessary to limit the trial to the practices in New York City, but, because the question of stand-

* Stenographer's minutes of argument of Leo Pfeffer, page 17, *Flast v. Gardner*, 66 Civ. 4102, S.D.N.Y., argued May 25, 1967.

ing appeared to both the single judge conducting the pre-trial conference and the three-judge court to be a preliminary and separate question, no such amendment was made. Nor was it indicated that amendment would be necessary or that particularization could not be adequately effected through the usual pre-trial conference procedure.

Appellees admit that "[m]any decisions of this Court indicate that the varying details of programs approved under the Act will be of critical significance from a constitutional standpoint." Appellants, of course, agree, and go further: the constitutional challenge in this litigation has already been limited to the construction put on Titles I and II by the appellees when they approved New York City programs receiving aid under these titles and the issues therefore are sufficiently sharp, tangible, and direct for this Court to take jurisdiction.

Respectfully submitted,

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JOSEPH B. ROBISON
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Of Counsel

September, 1967

SEP 29 1967

~~SUPREME COURT, U. S.~~

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF THE NATIONAL
COUNCIL OF CHURCHES AMICUS CURIAE
IN SUPPORT OF JURISDICTIONAL
STATEMENT**

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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS*
CURIAE IN SUPPORT OF JURISDICTIONAL
STATEMENT**

The National Council of Churches of Christ in the
U.S.A., for the reasons stated below under Interest of the
Amicus Curiae, respectfully moves this Court for permis-
sion to file a brief *amicus curiae* in support of the Jurisdic-
tional Statement in this case. Counsel for the Appellant

has consented to the filing of this brief, but counsel for the Appellee has denied consent. While the movant is aware that the Court does not favor motions for leave to file briefs *amicus curiae* at this stage, the special considerations present in this instance have led the movant to seek to file the accompanying brief.

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**BRIEF OF THE NATIONAL COUNCIL OF
CHURCHES AMICUS CURIAE IN SUPPORT
OF JURISDICTIONAL STATEMENT**

Interest of the Amicus Curiae

The National Council of Churches of Christ in the
U.S.A. is a membership corporation under the laws of the
State of New York, composed of thirty-four Protestant
and Orthodox religious denominations, which themselves

have an aggregate membership of approximately 42,500,000 throughout the United States. It is governed by a representative General Board whose 255 members are selected by the several denominations according to their respective procedures.

The General Board meets three times a year to determine the policies under which the National Council of Churches operates. In 1954 and 1961, the General Board adopted policy statements advocating federal aid to public schools only. Testimony was given before committees of both houses of Congress supporting the legislation for federal aid to education proposed by President Kennedy, which failed of enactment mainly because of a dispute over church-state issues.

When a new solution to the church-state issue was proposed by President Johnson early in 1965, the National Council of Churches scrutinized it carefully, and in a resolution adopted February 26, 1965, found it potentially acceptable. The resolution discussed the "child-benefit" concept on which the church-state solution in the President's education bill was based, and suggested certain limitations which the General Board felt should apply to that concept:

"In any program of federal aid that makes benefits available to children in non-public schools, certain safeguards should be designed to make clear that it is *children* and not *schools* which receive the benefit, viz.:

1. That benefits intended for all children be determined and administered directly by public agencies responsible to the electorate * * *;

2. That such benefits * * * not be conveyed in such a way that religious institutions acquire property or the services of [teaching] personnel thereby;

3. That such benefits not be used directly or indirectly for the inculcation of religion or the teaching or sectarian doctrine; and

4. That there be no discrimination by race, religion, class or national origin in the distribution of such benefits.

Since these distinctions are subtle, and the principles at stake important, adequate provision for judicial review should be included in any legislation on this subject.

Testimony to this effect was given to the House Subcommittee considering the legislation by Dr. Arthur Flemming, now President, and then First Vice President of the National Council of Churches, and former Secretary of Health, Education and Welfare. This testimony was instrumental in obtaining certain revisions which required public ownership and control of all benefits afforded children attending non-public schools.

When Dr. Flemming subsequently testified before the Senate Education Subcommittee, he was asked if he had seen the House Committee's revisions and if he was satisfied with them. He answered affirmatively. This exchange was cited in the House debate on the bill by Rep. Carl Perkins, Chairman of the House Subcommittee (*Congressional Record*, March 24, 1965, p. 5562).

The strategy of the supporters of the bill in both House and Senate was to resist all amendments, lest the bill suffer

the fate which had befallen earlier aid-to-education bills. The amendment which seemed most likely to break through this strategy and which would, if adopted, have alienated a major bloc of the bill's supporters (advocates of assistance to children in non-public schools), was the proposal to include in the bill a provision authorizing judicial review of constitutional issues. The National Council of Churches, because of the concluding sentence of its resolution quoted above, was urged to support an amendment for judicial review.

The National Council did not support such an amendment because its officers were persuaded that there was "adequate provision for judicial review" already in the bill. They were persuaded of this partly by a statement delivered by Rep. Emanuel Celler, Chairman of the House Judiciary Committee, that, "There is no aspect of this bill which raises issues of any significance in the field of church and state that will not be subject to judicial review" (*Congressional Record*, March 26, 1965, pp. 5929-5930).

Having recorded support of this view, the National Council of Churches now feels it has a responsibility to urge this Court to hear the appeals of those citizens who believe their rights under the First Amendment of the Constitution have been infringed by this Act or under color of its authority.

Statute Involved

The statutory provisions involved in this suit are Titles I and II of the Elementary and Secondary Education Act of 1965.

The Question Presented

Do citizens and taxpayers of the United States have standing to challenge in the federal courts an expenditure of federal funds on the ground that it is in violation of the Establishment and Free Exercise provisions of the First Amendment to the United States Constitution?

Statement of the Case

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the City and State of New York, challenging the constitutionality under the First Amendment of certain expenditures made by the Department of Health, Education and Welfare. The complaint alleges that these expenditures, purportedly made pursuant to the authority of the Elementary and Secondary Education Act of 1965, were made to finance the furnishing of instruction and the providing of instructional materials for use in religious and sectarian schools. The plaintiffs requested judgment declaring these expenditures to be unconstitutional and enjoining further expenditures for these purposes. No request was made for judgment requiring restitution for funds already expended or which will have been expended before issuance of the injunction sought in the action.

The District Court dismissed the complaint on the single ground that by reason of *Frothingham v. Mellon*, 262 U. S. 447 (1923), the plaintiffs had no standing to bring the action, that there was thus no justiciable controversy

and that the court therefore lacked jurisdiction of the subject matter. The court rejected the plaintiffs' contentions that *Frothingham* was not based upon absence of constitutional jurisdiction but upon judicial policy and that the policy considerations which required dismissal in *Frothingham* were inapplicable to a suit based upon the First Amendment. Although conceding that *Frothingham* has been subject to criticism, the court held that it had never been overruled or limited by this Court and that accordingly its authority was unimpaired.

The Question Presented is Substantial

1. The question of standing to sue presented by this appeal is of major significance because it controls the possibility of judicial review under the Establishment Clause of present and future federal expenditures in support of religious institutions. Widely proclaimed as embodying a solution to a difficult problem of church and state,¹ the Elementary and Secondary Education Act of 1965 is just one of many federal programs in the fields of health, education, and welfare that involve federal grants to church-related institutions.

A recent survey conducted by a unit of the United States Senate revealed that in 1966 there were 35 "major programs in education, extending from the preschool to the graduate level, which incorporate church schools into the Federal education scheme."² The same study revealed

1. See N.Y. Times, Jan. 27, 1965, at 14, col. 1; N.Y. Times, Jan. 30, 1965, at 8, col. 2.

2. Rept. by the Standing Subcommittee on Constitutional Rights of the Committee of the Judiciary, Sen. Rept. No. 473, 90th Cong., 1st Sess. (Aug. 2, 1967), p. 9.

that the Department of Health, Education and Welfare in 1966 managed 24 programs in the Public Health Service, 13 programs in the fields of research training, information services, construction grants, and workshop assistance, and 11 programs in the welfare field which "benefit religious institutions directly or indirectly."³

In light of the proliferation of federal programs with provisions authorizing aid to church-related bodies, it is a matter of central importance to the meaning and indeed the viability of the Establishment Clause to assure judicial review of expenditures under federal programs such as the Elementary and Secondary Education Act. A contrary result will immunize such programs from constitutional scrutiny although there is grave doubt about their validity under decisions of this Court. Surely, if it remains true that "No tax in any amount, large or small can be levied to support any religious activities or institutions," *Everson v. Board of Education*, 330 U. S. 1, 16 (1947), and if it is necessary to resist "the first experiment on our liberties," *Abington School District v. Schemp*, 374 U. S. 203, 225 (1963), the expenditures which benefit church schools under the Education Act are highly questionable expenditures. But it is not essential to the importance of the question raised here that the grants under the Education Act are of dubious validity. The Government has conceded that its position on standing would be identical no matter how clear the breach of the First Amendment.⁴ Accordingly, judicial review would be precluded under the deci-

3. *Id.* at 9-10.

4. See the dissenting opinion of Judge Frankel, *Jurisdictional Statement*, p. 20.

sion below even if the breach in the First Amendment wall was obvious, if, for example, government funds were used "to pay the salary of clerics, to support existing religious structures, etc."⁵ Whether our constitutional scheme countenances this is an issue, we suggest, of plain importance.

2. The plaintiffs in this case, as bona fide taxpayers, represent precisely the interest which the Establishment Clause was designed to protect. It is familiar history that a prime purpose of the Clause is to ban the use of public moneys—exactd from individual taxpayers—to support the institutions of any religion or all religions. Thus, "support" by the use of taxpayers' money was at the root of the concern by Jefferson and Madison that resulted in the drafting of the Clause.⁶

The chief reason for this concern is not far to seek and is as valid today as when the Bill of Rights was promulgated. As this Court said in *Engel v. Vitale*, 370 U. S. 421, 430 (1962):

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Such coercion inevitably accompanies a requirement that a taxpayer support a nominally secular program undertaken and controlled by a religious institution not respon-

5. *Id.* at 20 n. 4.

6. See *Everson v. Board of Education*, 330 U. S. 1, 11-13 (1947).

sible to public authority. This is exactly the complaint of the plaintiffs here with respect to the Education Act.⁷

The importance attributed to this value is reflected not only in the Establishment Clause itself, but in the numerous and solemn statements by the Framers of the Constitution and by this Court that even trivial exactions are not to be tolerated and the "slightest breach" resisted. See *Everson v. Board of Education*, *supra*, 330 U. S. at 18.

The taxpayer-citizens in this case are the victims of two kinds of coercion: as taxpayers they are forced to support educational programs at church-related schools, and as citizens they are subjected to the "indirect coercive . . . pressure to conform", *Engel v. Vitale*, *supra*, 370 U. S. at 430, implicit in governmental aid to religious institutions. They are, therefore, the logical and historically justified representatives of the public in challenging the expenditures under the Education Act. They likewise are persons who have suffered legal injury under long familiar notions of standing applied in a wide variety of cases, many of which did not involve the special considerations pertinent to litigation under the First Amendment.⁸

7. It might be added that other important values underlying the Establishment Clause will be sacrificed if judicial review is denied. Perhaps most vital is the ideal that government will not, through the power of the purse, be in a position to interfere with the autonomy and independence of religious groups and, conversely, that such church groups, will not be jockeying for influence in government circles. See *Everson v. Board of Education*, 330 U. S. 1, 59 (1946) (Rutledge J. dissenting); Pfeffer, *Church, State, and Freedom*, 135-139 (1967).

8. See, e.g., *Chicago v. Atchison, T. & S.F. R. Co.*, 357 U. S. 77, 83-84 (1958); *Scripps-Howard Radio v. Federal Communications Commission*, 316 U. S. 4, 14 (1942); see also *Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965); *Bantam Books v. Sullivan*, 372 U. S. 58, 64-65 n.6 (1963).

3. *Frothingham v. Mellon*, 262 U. S. 447 (1923), on which a majority of the Court below relied to dismiss this action is plainly distinguishable from the present case. Accordingly, a substantial question is presented as to the applicability of that decision to the deprivation of constitutional rights alleged here.

Mrs. Frothingham's challenge to the Maternity Act of 1921 was premised on the assumption that a taxpayer had standing, on that ground alone, to challenge any federal expenditure. She did not and could not assert a special impact on her or on any right of hers that was protected by the Constitution. For reasons stated above, and developed more fully in Part II of the comprehensive dissenting opinion below by Judge Marvin Frankel, the gravamen of the complaint in this case is a violation of the guarantee embodied in the Establishment Clause that citizens are to be free of any "tax in any amount, large or small, * * * levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson v. Board of Education*, *supra*, 330 U. S. at 16. Therefore, even apart from the fact that the "supremely precious" rights at stake under the First Amendment, *NAACP v. Button*, 371 U. S. 415, 433 (1963), may require an "exception to the usual rules governing standing," *Dombrowski v. Pfister*, *supra*, 380 U. S. at 486, the interest advanced here has a more substantial claim on this Court's jurisdiction than the complaint filed by Mrs. Frothingham.

This conclusion is strongly buttressed by the opinions of respected authorities, who have recognized the vital dis-

tion between the roving commission claimed by Mrs. Frothingham and the claim asserted here, which is grounded in specific constitutional language and validated by history and judicial precedent.⁹ This distinction, moreover, is consistent with the assumption of jurisdiction in *Eversón v. Board of Education*, *supra*. Finally, the reference by the Court below to the recent decision of this Court in *Abbott Laboratories v. Gardner*, 387 U. S. 136 (1967), is wholly misplaced. While endorsing the *Frothingham* case on its own facts, this Court recognized that an additional interest of a litigant—such as that claimed under the Establishment Clause here—is sufficient to sustain judicial review.

For these reasons, the Court should not permit the *Frothingham* decision to govern the present case without according the issue of justiciability plenary consideration.

Respectfully submitted,

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9. See Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1312 (1960); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev., 255, 302-305 (1961); Davis, 3 *Administrative Law Treatise* 244 (1958).

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IN THE
Supreme Court of the United States
October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Appellees.

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the United States District Court for the Southern District of New York, including the dissenting opinion (21a-54a)* is reported in 271 F. Supp. 1. The opinion of Judge Frankel granting plaintiffs' motion to convene a three-judge court (13a-20a) is reported in 267 F. Supp. 351.

* References are to the Appendix printed separately.

Jurisdiction

The decision of the District Court dismissing the complaint herein was rendered and filed on June 19, 1967 (3a). A notice of appeal therefrom was filed on June 26, 1967 (3a). On July 21, 1967, a certification of the record on appeal to this Court was filed (3a), and on October 16, 1967, this Court noted probable jurisdiction.

The jurisdiction of this Court rests on Title 28 of the United States Code, Section 1253.

The Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in part:

“I. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; * * *”

The relevant provisions of the Elementary and Secondary Education Act of 1965 (P.L. 874, Eighty First Congress) are set forth in the appendix hereto (*infra*, pp. 57-78).

The Question Presented for Review

This appeal presents a single question: Do citizens and taxpayers of the United States have standing to challenge in the Federal courts an expenditure of Federal funds on the ground that it is in violation of the Establishment and Free Exercise provisions of the First Amendment to the United States Constitution?

Statement of the Case

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the City and State of New York, challenging the constitutionality under both the "no-establishment" and "free exercise" provisions of the First Amendment of certain expenditures made by the Department of Health, Education and Welfare. The complaint, whose factual allegations must be presumed to be true for the purposes of this appeal, alleges that these expenditures, purportedly made pursuant to the authority of the Elementary and Secondary Education Act of 1965, were used to finance the furnishing of instruction and the providing of instructional materials for use in religious and sectarian schools. The plaintiffs requested judgment declaring these expenditures to be unconstitutional and enjoining further expenditures for these purposes. No request was made for judgment requiring restitution for funds always expended or which will have been expended before issuance of the injunction sought in the action (5a-10a).

Although the prayers for relief in the complaint (9a-10a) are not limited geographically and call for an injunction enjoining the defendants "from approving any program for the expenditure of Federal funds to finance in whole or in part instruction or guidance services in religious and sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools," it is quite clear that the gravamen of the complaint are the practices in New York City. Paragraph 10 of the complaint (7a) refers specifically to the

practices within the City of New York engaged in by the Board of Education of the City of New York. At the argument before the three-judge court on the motion to dismiss, plaintiffs, through their attorney, expressly stated that this case was to be deemed one limited to the practices of the New York City Board of Education.¹

It may be assumed that the practices within the City of New York complained of herein are paralleled in other parts of the nation,² and that if the plaintiffs are successful in this action the defendants will discontinue such practices wherever they are engaged in throughout the United States. However, as far as the present action is concerned, the defendants, the Secretary of the Department of Health, Education and Welfare of the United States and the Commissioner of Education of the United States, are required to defend only the programs and practices engaged in within the City of New York.

The plaintiffs do not challenge the constitutionality of the Elementary and Secondary Education Act of 1965. Paragraph 9 of the complaint states expressly that "There are many programs within the meaning of Title I. of the Elementary and Secondary Education Act of 1965 which could practicably be instituted by local education agencies which would qualify them for the receipt of Federal funds under the Act but which would not violate the provisions of the Federal Constitution. Among these programs are

1. Stenographer's minutes of argument of Leo Pfeffer, page 17, *Flast v. Gardner*, 66 Civ. 4102, S.D.N.Y., argued May 25, 1967.

2. See, e.g., complaint in *Carpenter v. Gardner*, United States District Court for the Eastern District of Pennsylvania, Civil Action No. 42818 (1967) wherein it is alleged that similar practices are engaged in within the City of Philadelphia.

those to provide pupil health and dental benefits in public and nonpublic schools, and programs for special instruction in courses such as reading, arithmetic, music and art and for guidance conducted on publicly owned premises after regular school hours and open equally to children regularly registered in public and nonpublic schools" (7a).

The complaint further alleges that "the Board of Education of the City of New York, a local educational agency, has in fact instituted and continues to institute and conduct programs such as these and has on the basis thereof in fact qualified for and received Federal funds under Title I of the Elementary and Secondary Education Act of 1965" (7a).

The essence of the complaint insofar as Title I of the Act is concerned is found in paragraphs 12 and 13 which allege that substantial Federal funds under this Title have been and, unless enjoined, will continue to be used "to finance, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools" (8a). In respect to Title II, paragraph 15 of the complaint alleges that substantial Federal funds are being and will continue to be used, unless enjoined, "to finance the purchase of textbooks and instructional and library materials for use in religious and sectarian schools" (8a).

The District Court, with Judge Frankel dissenting, dismissed the complaint on a single ground: that by reason of *Frothingham v. Mellon*, 262 U. S. 447 (1923), the plaintiffs had no standing to bring the action, that there was thus no justiciable controversy and the court therefore lacked juris-

diction of the subject matter. The court rejected the plaintiffs' contentions that *Frothingham* was not based upon absence of constitutional jurisdiction but upon judicial policy, and that the policy considerations which required dismissal in *Frothingham* were inapplicable in a suit based upon the First Amendment. The court likewise refused to agree with the plaintiffs' contention that the facts relating to standing presented in this case are identical with those in *Bradfield v. Roberts*, 175 U. S. 291 (1899), and that this Court's acceptance of jurisdiction in that case required the District Court to accept jurisdiction in this one. Finally, although conceding that *Frothingham* has been subjected to criticism, the court held that it had never been overruled or limited by this Court and that accordingly its authority remains unimpaired.

Summary of Argument

Neither *Frothingham v. Mellon* nor the *de minimis* principle on which it is based presents an insurmountable constitutional barrier to the present action. The determination that the plaintiff in that suit lacked standing to sue was not a holding that the Federal courts were without jurisdiction under Article III of the Constitution. Nothing in the Court's decision indicates an intent to make such a holding. Moreover, the Court's acceptance of jurisdiction and its decision on the merits in analogous cases establish this clearly, and the overwhelming consensus of respected constitutional authorities reaches the same conclusion.

Frothingham expressed a policy of judicial restraint based on factors which, however valid they may have been

in 1923, have no equivalent validity today. In any event, these factors have no relevance to a suit challenging governmental action in violation of the First Amendment, under both "establishment" and "free exercise." This Court has never upheld the dismissal under *Frothingham* of a citizen's or taxpayer's suit under the First Amendment or indeed any asserting a constitutional claim other than the narrow property right asserted in *Frothingham*.

Numerous weighty policy considerations dictate assumption of jurisdiction in this case. The controversy is one particularly fitted for judicial resolution and there is no other forum for its resolution. If jurisdiction is refused, substantial violations of a fundamental freedom of Americans will be unchecked for want of a technically, legalistically eligible protagonist. Refusal of jurisdiction would go directly contrary to the consistent national trend towards extending the fundamental freedoms of the First Amendment, particularly through expanded judicial protection. It would likewise go contrary to the policy of equalizing, both substantively and procedurally, the judicial protection of rights from infringement by Federal and state governments.

In short, all policy considerations dictate not a refusal but an acceptance of jurisdiction in this case.

ARGUMENT

/ POINT 1

No constitutional barrier precludes acceptance of jurisdiction of a citizen-taxpayer's suit challenging an expenditure of Federal funds as violative of the Establishment and Free Exercise provisions of the First Amendment.

A. The *Frothingham* Decision

The decision of the court below rests upon one decision, and one decision only—*Frothingham v. Mellon*. Because of that decision, the court held that “plaintiffs have no standing to bring this action, * * * there is no justiciable controversy and this court therefore lacks jurisdiction of the subject matter” (22a). We respectfully submit that the court below was in error, and that it did not lack jurisdiction of the subject matter of the controversy. An examination of the opinion in *Frothingham* shows clearly that the decision was not based upon want of constitutional jurisdiction.

Frothingham was one of two companion cases reported under the common title of *Massachusetts v. Mellon*. Unlike *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), wherein a single decision and opinion was written to cover two companion cases (*Pierce v. Society of Sisters* and *Pierce v. Hill Military Academy*), separate and independent opinions were written for *Massachusetts* and *Frothingham*, and it was only the accident of simultaneous decision that resulted in the reporting of both under a single case title. A comparison of the two decisions shows clearly that while *Massachusetts*

was based on want of constitutional jurisdiction, *Frothingham* was not.

Both cases were suits to enjoin the enforcement of the Maternity Act of 1921, the former an original suit in the Supreme Court by a State in its own capacity and as representative of its citizens, and the latter a District Court suit by a Federal taxpayer suing in that capacity. The asserted grounds for unconstitutionality were different; in *Massachusetts* it was that the Act impinged upon powers reserved to the states under the Tenth Amendment; in *Frothingham* that the statute constitutes a taking of property without due process of law in violation of the Fifth Amendment. In neither case did the Court reach the merits of the controversy, but from the very beginning of its opinions the Court indicated that the dismissals were based on different grounds. The Court said (at p. 480):

In the first case, the State of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens. The appellant in the second suit has no such interest in the subject-matter, nor is any such injury inflicted or threatened, as will enable her to sue.

Justifying its dismissal in the first case, the Court said (*ibid*):

* * * Under Article III, Sec. 2, of the Constitution, the judicial power of this Court extends "to controversies * * * between a State and citizens of another State" and the Court has original jurisdiction "in all cases * * * in which a State shall be a party." The effect of this is not to confer jurisdiction upon the Court merely because a State is a party, but only where it is a party

to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant * * *.

In distinguishing *Bradfield v. Roberts*, 175 U. S. 291 (1899) the Court said (at p. 486):

* * * The case * * * came here from the Court of Appeals of the District of Columbia, and that court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefore subject to the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. * * * [T]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court. *Crampton v. Zabriskie*, 101 U. S. 601, 609. Nevertheless, there are decisions to the contrary. * * * The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. * * * But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.

We will shortly indicate that even if the Court was correct in distinguishing *Bradfield v. Roberts* from other taxpayers' suits challenging the constitutional validity of Federal expenditures the present suit can be maintained. At this point we suggest only that the reasons for refusing jurisdiction in *Frothingham* as expressed in the above paragraphs are not based upon constitutional incompetence. If they were, the Court could have stated simply (as it did in *Massachusetts v. Mellon*) that dismissal was required because of absence of a case or controversy within the meaning of Article III. The reasons given for dismissal in *Frothingham* were:

(1) Equitable jurisdiction to enjoin a wrong will not be exercised where the injury to the protagonist is "indeterminable";

(2) The injury suffered by plaintiff is the same as that suffered by everyone else and therefore is in the nature of a public rather than a private wrong;

(3) The injury to the plaintiff is "minute," and therefore is subject to the old adage *de minimis non curat lex*, an adage which is inapplicable or less applicable where the suit is against a municipality rather than the Federal government;

(4) If the suit were entertained it would open the door to a multitude of similar suits with resulting "inconveniences."

Considering each of these reasons separately we note:

(1) Obviously, refusal of a court of equity to grant injunctive relief where the injury to the plaintiff is indefinite or "indeterminable" refers to a matter of equitable discretion and not constitutional competence.

(2) The reference to the identity of the injury suffered by the plaintiff and that of the public at large may well imply the historic basis for the holding in *Frothingham*, the ancient common law principle that a public nuisance is not subject to judicial action on the part of a member of the general public who has not suffered a particular, non-common injury. Quite clearly, this common law principle does not raise any question of constitutional competence under Article III.

(3) The equally ancient adage of *de minimis* similarly does not rise to the status of a constitutional issue of jurisdiction. If it did, the Court in *Frothingham* would have been required to overrule *Bradfield*, not distinguish it. In both *Frothingham* and *Bradfield*, the actual loss suffered by the plaintiffs in each case was undoubtedly less than a dollar. Quite possibly, it was less than a penny in both cases, but even if it be assumed that it was a dollar in *Bradfield* and only a penny in *Frothingham*, it is difficult to justify constitutional jurisdiction on the basis of a difference of ninety-nine cents. The fact that a taxpayer's interest in an unconstitutional expenditure by a municipality is greater than his interest in a similar expenditure by the Federal government does not mean that the former is also not *de minimis*. The difference between the minute pecuniary losses suffered by the plaintiff-taxpayers in *Bradfield* and in *Frothingham* is itself *de minimis*. The amount of additional taxes imposed on Arch Everson by reason of the fact that the Township of Ewing paid the public bus fares for a few Catholic children attending parochial schools could hardly have risen above *de minimis*, but that fact did not prevent this Court from accepting jurisdiction. *Everson v. Board of Education*, 330 U. S. 1 (1947).³

(Parenthetically, it may be noted that the most important decision in constitutional law and the one on which this case is based, *Marbury v. Madison*, 1 Cr. 137 (1803), was itself the product of a controversy which, measured by pecuniary standards, was not much more than *de minimis*.

3. The total expenditure for the transportation of parochial school students in *Everson* was only \$357.74. Transcript of Record, p. 49. The population of the Township of Ewing in 1940 was 10,146. *Everson v. Board of Education*, *supra*, at p. 62, fn. 60. The average cost per resident was therefore about three and a half cents.

Beveridge points out in his biography of Marshall (volume 3, p. 110) that of the seventeen persons whose commissions as justices of the peace were withheld by Madison "thirteen did not join in the suit, apparently considering the office of justice of the peace too insignificant to be worth the expense of litigation. Indeed, these offices were deemed so trifling that one of Adams's appointees to whom Madison delivered a commission resigned and five others refused to qualify.")

Moreover, whatever may have been the situation in 1923 is hardly the same today. In some cases the amount of pecuniary loss suffered by a Federal taxpayer may be substantially larger than that suffered by a municipal taxpayer. Professor Kenneth Culp Davis pointed this out in his testimony before the Senate Judiciary Subcommittee on Constitutional Rights (Hearings on S. 2097, 89th Congress, Second Session, p. 493):

The Court's reasoning in *Frothingham*, applied to today's tax facts, means that a taxpayer has standing. The Court said that the standing of a municipal taxpayer to challenge a municipal expenditure "is the rule of this court," because the effect on the taxpayer was "direct and immediate." It said that the effect of a Federal expenditure on a Federal taxpayer was "comparatively minute and indeterminable." That was true as of 1923. But it is not true as of 1966. Taxes that almost any corporation pays to the Federal Government are no longer "comparatively minute" as against taxes the same corporation pays to municipalities. General Motors pays a billion and a half to the Federal Government, and it pays no more than a tiny fraction of that amount to any municipality. The tax facts on which the *Frothingham* opinion was based have now turned right around backwards, but the law that was

made lingers on, after its foundation has eroded away. The General Motors stake in a \$10-billion program is about \$150 million. Because the rule of the Supreme Court since 1879 has been and still is that a municipal taxpayer has standing, and because that rule is clearly sound, a Federal taxpayer should now *a fortiori* have standing.

(4) Finally, it need hardly be argued that rejection of jurisdiction for fear of the "inconveniences" of a multitude of similar suits reflects a policy of judicial restraint and, not of constitutional incapacity to act.

The last paragraph in *Frothingham* does not negate the conclusion suggested here that *de minimis* does not present a constitutional barrier to a taxpayer's suit challenging the validity of a Federal expenditure. A court's power to declare a Congressional statute unconstitutional, the Court said, is an incident of its determination of a case before it. "If", the Court said (262 U. S. at p. 488) "a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." Hence, unless the plaintiff has established his standing to bring a law suit, there is no case before the court in which it can declare the statute unconstitutional and enjoin the execution of a judgment notwithstanding the statute. But whether the court will initially accept a case by one whose injury is so small as to be within the class of *de minimis* is an ancient common law question of judicial policy, not one of constitutional capacity.

When the authors of the Constitution wished to give constitutional status to a common law procedural policy they did not lack the means to express themselves, as when they

imposed upon the Federal judiciary the obligation of providing a jury trial and respecting the jury's determination in any common law action where the amount in controversy exceeds twenty dollars. (Amendment VII.) But nothing in Article III or elsewhere in the Constitution indicates an intent to accord constitutional status to the common law procedural principle of *de minimis*.

B. The Pre-Frothingham Precedents

That *Frothingham* and the *de minimis* principle on which it is based do not impose a constitutional barrier to citizens' and taxpayers' suits in the Federal court is established conclusively by the fact that such cases have been accepted by this Court both before and after *Frothingham*. Cases in which such suits were entertained and decided on the merits are *Millard v. Roberts*, 202 U. S. 429 (1906), *Bradfield v. Roberts*, *supra*, *Heim v. McCall*, 239 U. S. 175 (1915), *Wilson v. Shaw*, 204 U. S. 24 (1907), *Hawke v. Smith*, 253 U. S. 221 (1920), and *Coyle v. Smith*, 221 U. S. 559 (1911).

Millard v. Roberts was a suit against the Treasurer of the United States brought by a resident of the District of Columbia to enjoin the payment to two railroads of \$750,000 each on the grounds, first, that the act which authorized the grants was a revenue measure and could therefore constitutionally have originated only in the House of Representatives, and secondly, that it constituted a tax for a private purpose and therefore a deprivation of property without due process of law in violation of the Fifth Amendment. The Court affirmed the judgment for defendant,

holding that the act was not a "bill for raising revenue" within the meaning of Article I, Section 7 of the Constitution, and that its purpose was public rather than private.

Millard v. Roberts was a suit by a resident and taxpayer of the District of Columbia, as was *Bradfield v. Roberts*. We have suggested that this fact is irrelevant insofar as the question of constitutional capacity is concerned. But even if these suits are deemed actions against a municipality and thus subject to a rule different from that applicable to a suit against the Federal Government, the complaint in the present suit should not have been dismissed, for it too should have been deemed a suit against a municipality. *Bradfield*, we submit, is indistinguishable from the present case in respect to the jurisdictional issue. In that case, a Federal taxpayer, a resident and citizen of the District of Columbia, sued the Treasurer of the United States to enjoin the payment of Federal funds to a hospital, alleged to be sectarian, asserting that the appropriation, which had been made by Congress, violated his First Amendment rights.

That case and the present one are indistinguishable. In both, the funds came out of the general treasury of the United States, and were raised from taxes imposed upon all taxpayers in the United States, not merely local residents. In both, a municipal corporation was used as the means of transferring Federal funds to a sectarian institution; in *Bradfield*, it was the District of Columbia, and in the present case, the Board of Education of the City of New York. The defendant in that case was the Treasurer of the United States, the defendants in this one, the Secre-

tary of Health, Education and Welfare and the Commissioner of Education. In both cases, the defendants were represented by the Attorney General of the United States, and in both the plaintiffs sued as citizens and taxpayers of the United States and as residents of the local area. We submit therefore that, just as the *Bradfield* case was heard on the merits, so too should the present one be.

Heim v. McCall, *supra*, was a suit by a taxpayer of the State of New York against the Public Service Commission to restrain it from complying with a state law providing that only American citizens shall be employed in the construction of public works. The complaint alleged that the statute violated the Fourteenth Amendment to the Federal Constitution and that compliance therewith would raise the cost of public works projects. The Court expressly stated that it assumed that Heim as a taxpayer had "a right of suit" and passed on to the merits, upholding the constitutionality of the state statute.

Even if *Frothingham* can be distinguished on the question of constitutional competence from *Bradfield*, *Millard v. Roberts* and *Heim v. McCall* on the ground that these were or could be considered to be suits against a municipality, no such distinction is available in respect of *Wilson v. Shaw*, *supra*. This was a suit by a citizen and taxpayer of the United States residing in Illinois against the Secretary of the Treasury to restrain him from paying out any money for the construction of the Panama Canal. Among the grounds asserted by the plaintiff was that the Government had not legally acquired title to the land on which the Canal was to be built, that it cannot legally build on

land owned by another country, and that the Constitution does not empower the Government to build railroads or canals anywhere. Each of these grounds was considered by the Court and in each case held to be without substantive merit, requiring affirmance of the judgment for the defendant.

It is true that in each of these cases the Court stated that it was assuming but not passing on the question of the plaintiff's standing to bring the suit or raise the substantive issues. We submit, however, that this indicates that the Court deemed standing not a question of constitutional jurisdiction but of judicial policy. Ever since the Court, in 1793, turned down President Washington's request to advise him regarding the international law problems raised by the French Revolution (1 Warren, *Supreme Court in United States History*, 110-111) and *Hayburn's Case*, 2 Dall. 409 (1792), it has been unquestioned constitutional law that a Federal court may not decide where it cannot adjudicate, and that where constitutional jurisdiction is concerned, it is immaterial that no objection is raised by anyone. *Maskrat v. United States*, 219 U. S. 346, 354 (1911); *Chicago and Southern Air Lines v. Waterman S.S. Corp.*, 333 U. S. 103, 113 (1948); *U. S. v. Jefferson Electric Mfg. Co.*, 291 U. S. 386 (1934). *Marbury v. Madison*, *supra*, determined that the Federal courts have only such jurisdiction and powers as are conferred upon them by Article III of the Constitution; hence, a decision by the Supreme Court on a substantive question is an implicit determination that it has jurisdiction under the Constitution to adjudicate the controversy. Constitutional jurisdiction cannot be conferred by consent and therefore the reservation of the questions of the plaintiffs' standing to

sue in *Bradfield v. Roberts*, *Millard v. Roberts*, *Wilson v. Shaw* and *Heim v. McCall*, could only have contemplated the question of judicial policy, not of constitutional jurisdiction.

No reservation of the question of standing was expressed in *Hawke v. Smith*, 253 U. S. 221 (1920). Indeed, none could be since, unlike the other cases, *Hawke v. Smith* resulted in a decision by the Court in favor of the taxpayer on the merits. There plaintiff sued the Secretary of the State of Ohio to enjoin as a wasteful expenditure of public funds the printing of ballots for a referendum on whether the State should ratify the Eighteenth Amendment to the Federal Constitution. In reversing the state court's decision, this Court held that the Constitution contemplates ratification of amendments by state legislatures and not by popular referenda.

In *Frothingham*, the Court, in seeking to distinguish *Bradfield*, stated (262 U. S. at p. 487):

• • • The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. IV Dillon Municipal Corporations, 5th ed. §1580 *et seq.* But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment

out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

Hawke v. Smith cannot be so distinguished. A State is not a corporation; public or private, and its taxpayers are not stockholders. It is a sovereign government no less than is the United States, its taxpayers are citizens as are the taxpayers of the United States and the interest of a single taxpayer in the State Treasury "is shared with millions of others" and "is comparatively minute and indeterminable." (The added tax cost to a single taxpayer in the State of Ohio arising out of the one-time expenditure for the printing of referendum ballots certainly did not rise above *de minimis*.)

Nor can any valid distinction in respect to constitutional jurisdiction be based upon the fact that *Frothingham* was a Federally instituted suit while *Hawke v. Smith* came to this Court on appeal from a state court. Article III makes no distinction between the "judicial power" of the Supreme Court and of "such inferior courts as the Congress may from time to time ordain and establish." The only difference in respect to jurisdiction between the two tribunals is that between original and appellate determination; not between what may be determined in each. What is not a "case or controversy" within the meaning of Article III when presented in a state court does not become so merely by appeal to this Court. As the Court said in *Doremus v. Board of Education*, 342 U. S. 429, 434 (1952):

We do not undertake to say that a state court may not render an opinion on a federal constitutional ques-

tion even under such circumstances that it can be regarded only as advisory. But because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

Finally, we call the Court's attention to the case of *Coyle v. Smith, supra*. In that case, the Court accepted jurisdiction and passed on the merits of a taxpayer's suit challenging the act of the Oklahoma legislature in removing the capital of the State from Guthrie to Oklahoma City in violation of a provision in the act admitting Oklahoma into the Union as a State. No reservation of the question of standing or indeed any discussion of it is found in the Court's opinion, thus implicitly recognizing the Court's constitutional jurisdiction to determine the issues on the merits.

Before *Frothingham*, the Court accepted jurisdiction and passed on the merits of the respective controversies in *Bradfield v. Roberts*, *Millard v. Roberts*, *Heim v. McCall*, *Wilson v. Shaw*, *Hawke v. Smith*, and *Coyle v. Smith*, none of which was expressly or impliedly overruled in *Frothingham*. The difference in result between these cases and *Frothingham* can only be explained in terms of judicial policy, not constitutional jurisdiction.⁴

4. The majority in the present case did not pass on the question whether *Frothingham* stated a constitutional principle or a rule of policy, since it felt itself bound by the decision in either event (24a). This Court, of course, is under no such restriction and can find that the policy considerations underlying *Frothingham* are inapplicable to the present suit.

C. The Post-Frothingham Cases

The decisions of this Court since *Frothingham* uniformly support the conclusion that neither that decision nor the *de minimis* principle upon which it is based presents a constitutional barrier to the present suit. The Court accepted jurisdiction and decided on the merits the controversies in *Cochran v. Louisiana State Board of Elections*, 281 U. S. 370 (1930), *Everson v. Board of Education*, *supra*, *Adler v. Board of Education*, 342 U. S. 485 (1952), *Wieman v. Updegraff*, 344 U. S. 183 (1952), and *Harpër v. Virginia State Board of Education*, 383 U. S. 663 (1966). Other non-taxpayer suits similarly establish that the fact that the plaintiff's interest may be so minute as might be categorized as *de minimis* does not constitute a constitutional bar to adjudication. Among these are *Engel v. Vitale*, 370 U. S. 421 (1962) and *Baker v. Carr*, 369 U. S. 186 (1962).

Cochran v. Louisiana State Board of Education, *supra*, decided seven years after *Frothingham*, was an appeal from a state court decision in a taxpayer's suit challenging as a violation of substantive due process the furnishing of textbooks for use in parochial schools. This Court accepted the appeal and decided the issue on the merits.

Everson was a taxpayer's suit challenging the constitutionality of a state statute authorizing the payment by local boards of education of the cost of transporting children to parochial schools. The Court accepted jurisdiction of an appeal from the state supreme court's decision upholding the validity of the statute under the First Amendment. Nothing in the Court's decision intimates the slightest

doubt that it had jurisdiction to review the state court's decision. This implicit assumption of constitutional power to decide is particularly significant in view of the Court's action five years later in *Doremus v. Board of Education*, *supra*, wherein it refused to pass on the merits of a controversy because it found no "case or controversy" to be present.

In the present case, the majority in the court below cited *Doremus* in support of its dismissal of the complaint (24a). Yet, a careful reading of the decision indicates that it supports the position of the appellants herein rather than contradicts it. The case involved a suit by the parent of a public school pupil and by a taxpayer challenging Bible reading in the public schools. The Court dismissed the appeal from a state court decision, upholding the practice, on the ground that the issue had become moot in respect to the first plaintiff by reason of the fact that his child had graduated from the public school before the appeal was taken and that the second, the taxpayer-plaintiff, had no standing to sue. In support of its decision, the Court cited *Massachusetts (Frothingham) v. Mellon*.

Citation of and reliance upon *Frothingham* indicates clearly that the Court found no difference between suits against the United States and suits against States and municipalities as far as constitutional jurisdiction is concerned. Hence, if the Federal courts had constitutional jurisdiction in *Bradfield*, *Everson* and all the other cases discussed herein, it has constitutional jurisdiction of the present case even if it be deemed a suit against the Federal Government rather than the Board of Education of the City of New York.

The Court distinguished (not overruled) *Everson* on a ground which requires distinction of the present case. The Court said that "Everson showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not."

By this the Court meant and only could have meant that the plaintiff-taxpayer had not alleged any (unconstitutional) expenditure of public funds. Obviously, an injunction suit against expenditure of funds cannot be entertained where there is no allegation that there had been any expenditure. A completely different situation would have been presented had the complaint sought an injunction not against Bible reading but against the expenditure of public funds for the purchase of Bibles for use in public school devotional exercises. In such case, the situation would have been the same as that in *Everson* (and *Bradfield v. Roberts*, *Cochran*, *Hawke v. Smith*, and the other cases heretofore cited in which the Court took jurisdiction in taxpayers' suits). It would also have been the same as the present case, which does allege "a measurable appropriation or disbursement of * * * [public] funds occasioned solely by the activities complained of."

It is, we submit, beyond the bounds of rationality to assert that the Constitution authorizes a Federal court to forbid a State's violation of the First Amendment in a suit brought by a resident whose pecuniary injury is measured by his interest in the expenditure of \$357.74 by a town of over ten thousand inhabitants, whereas it may not forbid such a violation where the plaintiff cannot show such minute pecuniary injury to himself. Such a distinc-

tion smacks of medieval magic rather than law or logic. *Everson* or *Doremus* can be reconciled only on the basis of the fact that some expenditure was made by the State of New Jersey in the former case but not in the latter, rather than on the basis of the pecuniary injuries suffered by the respective plaintiffs.

The constitutional test, therefore, can only be the public expenditure, not the extent of the plaintiff's particular injury as a result of that expenditure. If the Constitution permits a single taxpayer to sue to prevent a state expenditure of \$357.74, it certainly permits seven taxpayers to join in a suit to prevent a Federal expenditure of many millions of dollars in violation of that Constitution.

On the same day that this Court decided *Doremus* it also decided *Adler v. Board of Education, supra*. There, over the vigorous dissent of Mr. Justice Frankfurter, the Court took jurisdiction and passed on the merits of a suit by eight taxpayers challenging the constitutionality of the New York public school teachers' loyalty law. The following from the dissenting opinion so clearly presents the argument against acceptance of Federal jurisdiction in taxpayers' suits that it warrants being set forth here (342 U. S. at 501-502):

About forty plaintiffs brought the action initially; the trial court dismissed as to all but eight. 196 Misc. at page 877, 95 N.Y.S. 2d 114. The others were found without standing to sue under New York law. The eight who are here as appellants alleged that they were municipal taxpayers and were empowered, by virtue of N. Y. Gen. Municipal Law §51, McK. Consol. Laws, c. 24, to bring suit against municipal agencies

to enjoin waste of funds. New York is free to determine how the views of its courts on matters of constitutionality are to be invoked. But its action cannot of course confer jurisdiction on this Court, limited as that is by the settled construction of Article III of the Constitution. We cannot entertain, as we again recognize this very day, a constitutional claim at the instance of one whose interest has no material significance, and is undifferentiated from the mass of his fellow citizens. *Doremus v. Board of Education*, 342 U. S. 429. This is not a "pocketbook action." As taxpayers these plaintiffs cannot possibly be affected one way or the other by any disposition of this case, and they make no such claim. It may well be that the authorities will, if left free, divert funds and effort from other purposes for the enforcement of the provisions under review, though how much leads to merest conjecture. But the total expenditure, certainly the new expenditure, necessary to implement the Act and Rules may well be *de minimis*. The plaintiffs at any rate have not attempted to show that any such expenditure would come from funds to which their taxes contribute. In short, they have neither alleged nor shown that our decision on the issues they tender would have the slightest effect on their tax bills or even on the aggregate bill of all the City's taxpayers whom they claim to represent. The high improbability of being able to make such a demonstration, in the circumstances of this case, does not dispense with the requirements for our jurisdiction. If the incidence of taxation in a city like New York bears no relation to the factors here under consideration, that is precisely why these taxpayers have no claim on our jurisdiction.

But, notwithstanding these vigorous words, the Court did take jurisdiction, and none of the other eight Justices expressed any doubt as to the correctness of doing so. Cer-

tainly, the most reasonable if not the only explanation for this is that they did not consider taxpayers' suits beyond the Federal courts' judicial power under Article III.

It should be noted too that the statement in the quoted paragraph that the Court's decision would not have the slightest effect "on the aggregate bill of all the City's taxpayers whom they [the plaintiffs] claim to represent" does not apply to the present case. Obviously, Federal expenditures of the many millions of dollars for the support of sectarian schools which is almost certain to result if this Court disallows jurisdiction in the present suit, will surely have a substantial effect on the aggregate bill of all the taxpayers in whose behalf this class action has been brought. It may therefore well be that even Mr. Justice Frankfurter would have agreed to the assumption of jurisdiction in this case. This conclusion is supported by the fact that later in the same year as *Doremus* and *Adler* he concurred, without raising the jurisdictional question, in *Wieman v. Updegraff*, *supra*.

This was a suit by citizens and taxpayers of the State of Oklahoma to enjoin public officials from paying further compensation to employees who had not subscribed to a loyalty oath prescribed by a state statute. This Court accepted an appeal from the state court's decision and held the statute unconstitutional.⁵

5. It is true that public employees affected by the statute intervened in the suit and were the appellants in this Court. But that does not alter the fact that the *plaintiffs* were taxpayers. This was not a suit by dismissed public employees against the State to compel reinstatement or payment of salaries. Between them and the State there was no case or controversy, else there would have been no need for a taxpayer's suit against the State. Were the taxpayers to have been held wanting in standing the appeal to this Court would have presented at best a quest for an advisory opinion, which the Court certainly would have rejected.

The most recent case in which a tax can fairly be deemed *de minimis* was involved is *Harper v. Virginia State Board of Elections, supra*. There this Court found no difficulty in sustaining the right of a citizen to sue in the Federal courts for judgment declaring unconstitutional a state law imposing a poll tax of \$1.50 as a prerequisite to voting. One dollar and fifty cents does not, we suggest, rise above *de minimis* but that fact did not prevent the Court from declaring the law to be unconstitutional.

Two other post-*Frothingham* decisions are relevant, *Engel v. Vitale, supra*, and *Baker v. Carr, supra* (and its successors, such as *Wesberry v. Sanders*, 376 U. S. 1 (1964)). While these were not taxpayers' suits they both involve the question of *de minimis* and both support our contention that that concept does not constitute a constitutional barrier to this suit.

Engel was a suit to enjoin the public school sponsored recitation of a so-called non-sectarian prayer formulated by the New York Board of Regents. The prayer consisted of 22 words whose recitation could barely have taken ten seconds—certainly *de minimis* if that standard is applicable to a suit under the First Amendment. In response to the *de minimis* claim, the Court said (370 U. S. at 436):

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because

the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment; however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

“[I]t is proper to take alarm at the first experiment on our liberties. * * * Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever!”

Baker v. Carr, supra, was predicated on the claim that the plaintiffs' votes were “debased” or devalued by reason of malapportionment. But certainly an individual citizen's proportionate interest in a State or Federal legislator would seem to be about as close to *de minimis* as one can get. Our national population has now reached 200 million so that on the average each of the 435 Congressmen represents more than a half a million Americans. Nevertheless, the Court held an individual's interest sufficient to support a suit asserting not that that interest had been destroyed but only that it had been devalued and thus made even more minute.

It should be noted that although Justice Frankfurter and Harlan dissented, neither did so on the ground that the plaintiffs lacked standing to sue, but only that the question raised was political and hence non-justiciable. This, we suggest, is particularly significant in view of the assertion

in the Court's opinion (p. 206 fn. 27) that Mr. Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U. S. 549 (1946) did not rest on the appellants' lack of standing.

D. The Constitutional Authorities

In view of these decisions, as well as others that could be cited,⁶ it is hardly surprising that it is almost a universal consensus among recognized constitutional authorities that *Frothingham* imposes no constitutional barrier to the present suit. This consensus is summed up in the statement of Professor Paul Freund to the Senate Subcommittee considering judicial review (Hearings, *supra*, p. 499) that "The defect in Federal taxpayer's suits does not rise to the level of an article III infringement." See also statements of Professors Louis L. Jaffe (p. 444), Kenneth Culp Davis (pp. 492, 497), Robert G. Dixon, Jr. (p. 510), Paul G. Kauper (p. 501), Arthur S. Miller (p. 530) and Arthur E. Sutherland (p. 535). It is also significant that although the present Solicitor General, in his then capacity as dean of Harvard Law School, opposed the broadening of S. 2097 to encompass non-First Amendment taxpayers' suits, he did not oppose enactment of the bill in its then form. Moreover, his opposition to the broadening of the measure was not based upon constitutional grounds, but only on policy. (Hearings, p. 496).⁷

6. *E.g.*, *Smiley v. Holm*, 285 U.S. 355 (1932); *Koenig v. Flynn*, 285 U.S. 375 (1932); *Coleman v. Miller*, 307 U.S. 433 (1939); *Wood v. Broom*, 287 U.S. 1 (1932); *McCollum v. Board of Education*, 333 U.S. 203, 206 (1948).

7. See, also: Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961); 3 Davis, *Administrative Law*, Sec. 22.09 (1958); Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353 (1955); Note, *Taxpayers' Suits*, 69 Yale L.J. 895 (1960); Dorsen, *The Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit*, 12 Buffalo L. Rev. 35 (1962).

To close this Point of our brief, we note that the Senate of the United States agrees with our contention that neither *Frothingham* nor any other decision of this Court stands in the way of Federal court determination of the present action. By passing S. 3, 90th Congress, 1st Session, which would authorize taxpayers' suits to enjoin violation of the First Amendment no-establishment clause through the expenditure of Federal funds, the Senate clearly expressed its opinion that such suits are within the competence of the Federal judiciary under Article III. While, of course, such expression of opinion is not binding upon this Court, it is, we submit, entitled to great weight, particularly since no member of the Senate Committee on the Judiciary or of the Senate itself indicated any dissent from the conclusion. See, Senate Report No. 85, 90th Congress, 1st Session, to accompany S. 3.

POINT II

The factors which dictated judicial restraint in *Frothingham* have no equivalent validity today and in any event have no relevance to a suit under the First Amendment.

A. The Specter of Multitudinous Suits

"Every opinion," said John Marshall, "to be correctly understood ought to be considered with a view to the case in which it was delivered." *United States v. Aaron Burr*, 4 Cr. 470, 482 (1807). The dismissal of the complaint in *Frothingham* must be understood in the context of the controversy presented for adjudication, as well as of the time in which it was presented. The complaint sought a determination that the due process clause of the Fifth Amend-

ment forbade Congress to expend Federal funds for such social welfare purposes as providing maternity benefits for indigent child-bearing women. The period in which *Frothingham* was decided was well described by this Court in *Ferguson v. Skrupa*, 372 U. S. 726, 729 (1963):

*** There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, outlawing "yellow dog" contracts, setting minimum wages for women, and fixing the weight of loaves of bread. (Citations omitted)

Measured by the standards of that period the Court would have found it difficult to decide against Miss Frothingham on the merits or to uphold the validity of the Maternity Act. Moreover, a decision on the merits would also have threatened all other Federal social welfare legislation at a time when such legislation was already commonplace throughout the world.⁸ This dilemma was avoided by using a device which had never before been used to dismiss such an action (no authority was cited in *Frothingham* to support the decision)—the plaintiff's lack of a definite and measurably sufficient pecuniary interest in the outcome to justify his suit.⁹

8. Great Britain, for example, had enacted a national unemployment insurance law as early as 1911. Clarke, *Social Legislation*, p. 477 (1957).

9. See, Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338, 359-361 (1924) for a somewhat similar explanation of *Frothingham*.

Even if determination of *Frothingham* on the merits would have culminated in a decision upholding the validity of the statute, the constitutional law of the period would have required a full-scale consideration of the merits. It would have required similar full-scale consideration of any number of other suits attacking similar social welfare legislation. It is therefore not surprising that the Court should say (262 U. S. at 487):

* * * If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. * * *

As *Ferguson v. Skrupa*, *supra*, indicates, the constitutional law of the *Frothingham* era is no longer with us and is not likely to return, at least in the foreseeable future. Today the prospect of success in suits such as *Frothingham* is so remote that they are rarely brought. There is, however, no way for the courts to prevent the institution of lawsuits, no matter how patently meritless they are. (*Cf. Zucht v. King*, 260 U. S. 174 (1922)). All a court can do is dismiss the suit at the earliest opportunity.

But a court cannot do more where the plaintiff lacks standing to sue. *Frothingham*, no matter how often reaffirmed, cannot prevent the institution of taxpayers' suits. Dismissal of a suit for patent insubstantiality entails no

greater inconvenience upon a court than dismissal for want of standing. Hence, the fear allowing *Frothingham*-type suits would result in embarrassing inconveniences to the Federal courts, while perhaps valid in 1923, has no validity today.

Experience fully supports this conclusion. With the possible exception of New Mexico¹⁰ and New York (and even the latter allows taxpayers' suits against municipalities¹¹), probably every state in the Union allows suits by taxpayers to prevent unconstitutional expenditures of state funds, or at least does not clearly bar them (Note, 69 Yale L.J. 894, 900-901). None of these states has found its courts to be inundated with meritless taxpayers' suits; at least, none has found it necessary to change its law to bar such suits. There is, therefore, not the slightest indicia of empiric evidence to justify the fear of multitudinous suits expressed in *Frothingham*, even if such suits were allowed in all kinds of cases including *Frothingham*-type controversies, and certainly not if such suits were allowed only in First Amendment controversies—which is all that is asserted here.

We suggest, finally, that even if the fear of multitudinous suits expressed in *Frothingham* were valid, that fact would not alone justify denial of the right to sue in the present case. Convenience is not necessarily the highest value in a democratic society. First Amendment freedoms are precious, and their preservation may require us to put

10. But cf. *Miller v. Cooper*, 56 N.M. 355 (1952); Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353, 388-89 (1955).

11. See *Adler v. Board of Education*, *supra*.

up with many inconveniences, such as littered streets (*Schneider v. Irvington, New Jersey*, 308 U. S. 147 (1939)), blaring amplifiers (*Saia v. New York*, 334 U. S. 558 (1948)), unwelcome doorbell ringers (*Martin v. Struthers*, 319 U. S. 141 (1943)) and expensive police protection for racist rabble-rousers (*Terminiello v. Chicago*, 337 U. S. 1 (1949)). Freedom from establishment of religion and compulsory taxation for religious purposes is no less precious than the other freedoms secured by the First Amendment and if the price of maintaining it is suffering a multitude of meritless suits, the bargain may nevertheless be very much worthwhile.

B. *De Minimis* and Concrete Adverseness

In *Baker v. Carr*, *supra*, the Court said (369 U. S. at 204) that the gist of the question of standing is whether the plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Applied to the *de minimis* rule, this presumably means that if a plaintiff's stake in the outcome is minute there will not be the necessary incentive to assure concrete adverseness.

This assumption may have validity in a *Frothingham*-type suit. There the only interest sought to be protected was pecuniary and the suit itself was analogized to one by a stockholder of a private corporation or a taxpayer of a municipal corporation to prevent the waste of corporate assets through unauthorized or unlawful expenditures. The latter suits may be maintained because the plaintiffs' interests are relatively large (and, presumably therefore,

will be vigorously defended) while the former may not because the interest sought to be protected is minute. Few people, it may be assumed, will spend a lot of money in vigorously prosecuted litigation to save a little money in increased taxation.

But the plaintiffs in the present suit and in similar First Amendment suits are not watchdogs of the public treasury. They are not motivated by any desire to keep taxes down. They sue, in the phraseology of *Doremus*, to prevent a pocketbook injury but only because that is part of what they deem a much graver injury, an injury to the right to live under a government which separates itself strictly from the church and church affairs.

Is it not reasonable to assume that litigants so motivated will have "a personal stake in the outcome of the controversy" at least as great as that possessed by taxpayers suing only to save themselves some money? Is it not probable that the adverseness in their suit will be no less concrete than that in the ordinary municipal taxpayer's suit? Was *Bradfield v. Roberts*, which sought to enjoin the United States Treasurer from paying funds to a religious group less vigorously prosecuted than *Willard v. Roberts*, which sought to enjoin the same United States Treasurer from paying public funds to the Baltimore and Ohio Railroad?

The answer to the question and the crux of the matter lies in the fact that to many Americans monetary concerns do not occupy the highest station in the hierarchy of values and that other values will be defended in the courts with no less vigor and robustness.¹²

12. In the present case, the number and nature of the *amici curiae* on both sides assure robust and vigorous adverseness.

C. *De Minimis* and the Establishment of Religion

Neither *Frothingham* nor the *de minimis* concept on which it is based, we submit, has validity in a suit asserting a violation of the First Amendment. As Mr. Justice Stone stated in holding that the \$3,000 jurisdictional minimum imposed by §24(1) of the Judicial Code did not bar a suit to enjoin suppression of speech and assembly,

• • • There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation, and in many instances, like the present, no suit in equity could be maintained for their protection if proof of the jurisdictional amount were prerequisite. We can hardly suppose that Congress, having in the broad terms of the Civil Rights Act of 1871 vested in all persons within the jurisdiction of the United States a right of action in equity for the deprivation of constitutional immunities, cognizable only in the federal courts, intended by the Act of 1875 to destroy those rights of action by withholding from the courts of the United States jurisdiction to entertain them. (*Hague v. C.I.O.*, 307 U. S. 496, 529 (1939)).

What is true of the First Amendment right to freedom of speech and assembly is, we submit, no less true of the First Amendment rights to freedom from an established church and coerced taxation for religion. As early as 1785, when Madison wrote in his monumental Memorial and Remonstrance the warning against a "three-pence" establishment in the extract from *Engel v. Vitale*, which we have set forth above (p. 30), it has been recognized that it is the fact of governmental encroachment on the domain of

religion and not the extent of that encroachment which violates the principle of church-state separation. It was recognized in the classic interpretation of the no-establishment clause first expressed in *Everson*, and since reiterated three times,¹³ wherein the Court said (330 U. S. at 15-16):

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis added.)

It was recognized by Mr. Justice Rutledge in his dissent in *Everson*, which to him was not "just a little case over bus fares" (*supra*, 330 U. S. at p. 57), wherein he asserted (at p. 63):

• • • The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate

13. *McCullum v. Board of Education*, *supra*, 333 U.S. at 210-11; *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 492-493 (1961).

the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. * * *

It was recognized too in *McCollum v. Board of Education, supra*. In that case, the Illinois trial and Supreme Courts had found (Rec'd, pp. 78-79, 275; 396 Ill. 14) that the expense incurred by the public school system as a result of the program of released time for religious instruction (wear and tear on furniture, electric current on dark days, etc.) was so slight as to fall within the *de minimis* rule. The same argument was pressed before this Court by the appellees in that case, but the Court refused to accept it.

It was recognized again in *Engel v. Vitale, supra*, in the extract which we have already quoted.

Finally, it was recognized in the last establishment case this Court has decided, *School District of Abington Township v. Schempp*, 374 U. S. 203 (1963), wherein the Court said (at p. 225):

* * * [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties." * * *

In the light of these expressions, it is hardly surprising that this Court has never rejected an establishment

ease on the basis of *Frothingham* or the *de minimis* policy on which it is premised.¹⁴ As we have indicated (*supra*, p. 24), *Doremus* is no exception."

D. *De Minimis* and the Free Exercise of Religion

The present suit is based not only on the Establishment but also on the Free Exercise Clause of the First Amendment. The complaint sets forth a separate and independent count asserting that the use of Federal funds to finance sectarian schools constitutes compulsory taxation for religion and is therefore a violation of the plaintiffs' free exercise of religion. Fundamental to the concept of religious freedom, as envisaged by the Framers, was the belief that was destructive of personal freedom to compel any man to pay taxes for the support of religion. Indeed, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes.¹⁵ It was the effort to enact just such a statute for financing religious schools in Virginia that gave rise to that state's adoption of Jefferson's

14. The decisions cited in Point I of our brief indicate that the same is true in respect to all other constitutional law cases other than the substantive due process property type of suit involved in *Frothingham* and which today would in any event be barred by the principle most recently reaffirmed in *Ferguson v. Skrupa, supra*.

15. As the Court said in the *Everson* case, *supra*, 330 U. S. at 11:

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty.

Bill for the Establishment of Religious Freedom which was the basis of both the establishment and free exercise provisions of the First Amendment.

Where free exercise is concerned, the Court has never deemed quantitative considerations of relevance. Indeed, it would contravene the proscriptions set forth in *United States v. Ballard*, 322 U. S. 78 (1944) and *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94 (1952) for a court or any other agency of government to pass judgment on whether a particular infringement on the free exercise of religion is of substantial or minimal weight. All religions are based upon symbolism (cf. *West Virginia State School Board of Education v. Barnette*, 319 U. S. 624 (1943)) and compulsory taxation even to the extent of "three pence" may violate the taxpayer's conscience no less than taxation to the extent of three thousand dollars. It was not the amount of the tax that sent Thoreau to jail, it was the fact that the tax in any amount violated his conscience. Similarly, it was only a symbol that kept Rosika Schwimmer from American citizenship, for it was hardly likely that a 60-year-old woman would ever be called on to take arms in defense of her country. *United States v. Schwimmer*, 279 U. S. 644 (1929).

Here, too, the *de minimis* concept on which *Frothingham* relied is inapplicable. Although *Engel v. Vitale* was decided on the basis of establishment rather than free exercise, can it be doubted that if compulsion had been present there a violation of free exercise would have been found even though recitation of the 22-word prayer took little more than a few seconds? The point of these oases is that

the *de minimis* concept is of no relevance in cases challenging government action on the ground that it violates religious conscience.

E. *Frothingham* and the Separation of Powers

There is a suggestion in *Frothingham* (262 U. S. at 488-89) that the acceptance of jurisdiction there would have been inconsistent with the principle of the separation of powers and that to issue an injunction against the expenditure authorized by Congress would be "to assume a position of authority over the governmental acts of another and co-equal department" of the government. This suggestion undoubtedly had substantial validity in the situation presented in *Frothingham*, but only as a matter of judicial policy. To hold it a matter of constitutional jurisdiction would require overruling of *Marbury v. Madison*, *supra*, for whenever the Court exercises its responsibility of judicial review it is assuming "a position of authority" over the acts of Congress, an authority based on the premise of the supremacy of Constitution over statute.

The Constitution, Marshall pointed out in *Marbury* (1 Cr. at 179), forbids Congress to enact a bill of attainder and requires the courts not to give effect to it should Congress nevertheless enact it, although this is clearly assuming "a position of authority" over an act of a co-equal branch of the government.

Because the Constitution forbids Congress to enact a bill of attainder, the Court required the Government to pay the salaries of Lovett, Watson and Dodd, even though the Constitution (Art. I, §9) delegates to Congress the power

of the purse and forbids the payment of any Federal money except in consequence of an appropriation made by Congress. *United States v. Lovett*, 328 U. S. 303 (1946).

But as the Constitution prohibits Congress to enact a bill of attainder, no less explicitly does it prohibit it to enact a law respecting an establishment of religion. And if the Court may require a payment because the refusal of Congress to authorize it was a bill of attainder, it may, we submit, equally require non-payment because its authorization was a law respecting an establishment of religion.

The argument that resort should be had to Congress rather than the courts is particularly inapposite in a First Amendment case. As the Court said in *Schempp* (374 U. S. at p. 226), quoting *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638 (1943):

\ The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

We emphasize strongly, as this Court has done in all establishment cases from *Everson* through *Schempp*, that the establishment of religion clause is as much a part of the First Amendment as is every other guarantee in that opening paragraph of the Bill of Rights, and that the right

to freedom from an establishment of religion is one of the "fundamental freedoms" which "may not be submitted to vote" and which "depend on the outcome of no election."

POINT III

Important policy considerations dictate assumption of jurisdiction in this case.

We could rest our case at this point for we have established, we believe, that neither *Frothingham* nor the *de minimis* principle on which it is based bars this suit either on constitutional or on policy grounds, and there is therefore no reason why this case should be treated differently from any other case presenting a Federal question. At the very least, the burden is on the Government to establish why this suit should not be entertained. However, we go further and set forth a number of weighty considerations which dictate that this case should be heard and decided by the Federal courts.

A. The Justiciability of the Issues

This case raises exactly that type of legal issue which, ever since *Marbury v. Madison*, it has been the function of the judiciary to resolve. If the expenditures challenged herein had been made by State officials, there is no question that the issues would ultimately be decided by this Court; even *Doremus* would not stand in the way. Yet the constitutional questions are not different merely because the expenditures are made by Federal officials. They are legal questions which appropriately should be decided by a court.

of law. As the Court said in *West Virginia State Board of Education v. Barnette*, *supra*, it is the judiciary to whom is assigned responsibility for "the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century. * * *". (319 U. S. at 639.) There were no public schools, no parochial schools and no Federal support of either in 1791 and therefore no specific intent as to the applicability and effect of the First Amendment to the situation in the present case. The translation of the generalities into concrete restraints, therefore, can be effected only by the courts.¹⁶

B. The Need for Authoritative Determination

If the Federal courts close their doors to suits such as the present one, there is no other legal forum to which the litigants or anyone else can turn to for an authoritative determination of important and difficult constitutional and legal questions. Lawmakers and administrators would lack the guidelines which they need to enable them to carry out their functions within constitutional limitations, guidelines which only this Court can provide. Since Article III does not permit advisory opinions, these guidelines can be provided only by means of a lawsuit such as the present one.

16. Judicial responsibility for the translation of eighteenth century generalities to twentieth century specifics is not limited to the First Amendment but applies to all of the Constitution. It is because the judiciary has fulfilled this responsibility that a document written in the eighteenth century has survived and remains viable and vigorous in the nuclear age. *McCulloch v. Maryland*, 4 Wheat 316 (1819) is, of course, the supreme example of creative judicial discharge of this responsibility, but every time a Federal court interprets and applies a constitutional provision, it is in effect engaging in the process of what might be called continuing *aggiornamento*.

It would be a matter of great misfortune if the Court would allow the all but invisible difference between the pecuniary injury suffered by a Federal taxpayer from that suffered by a State taxpayer to stand in the way of providing these needed guidelines. The matter was well put by Professor Davis in the following words:

Much is lost by continued uncertainty about the constitutionality of proposed spending programs. Congress is guided by the courts as to the constitutionality of other action but not as to the constitutionality of spending. Debates in Congress about the constitutionality of federal aid to parochial schools did not and could not settle the issue, and they impeded the legislators from focusing upon the merits of proposals. Congressmen and others flounder when the courts are cut off from resolving constitutional issues. Because we have the habit of looking to the courts on such issues, we need their help. Our historical background makes us dependent on the courts. Unplanned and accidental arrangements should not be allowed to cut down the availability of courts when they are needed. (Davis, "*Judicial Control of Administrative Action*": *A Review*, 66 Colum. L. Rev. 635, 665 (1966).)

The extent, if any, to which the Federal funds allocated by the Elementary and Secondary Education Act of 1965 can constitutionally be used to support instruction in parochial schools is a question that only this Court can definitively determine. That such a determination is of national importance is indicated by the statement of the defendant, Harold Howe, United States Commissioner of Education, according to a news report in the *New York Times* of November 19, 1966, "that the courts would have to clarify what Federally financed services could be given to students in church-related schools" and that, "without

court rulings * * * Federal and state education agencies will continue to have problems."

Not only legislators and administrators need this Court's definitive determination; so too does the general public. It is an unhealthy condition for millions of citizens and taxpayers to be in a frustratingly unresolvable and continuing doubt as to whether their government is violating the national charter. True enough, in respect to certain issues deemed by the Court to be non-justiciable¹⁷ and hence not within its competence under Article III, this is unavoidable. But, as we have sought to establish in Point I of this brief, this is not so in respect to the issues raised in the present controversy.

C. The Courts as Guardians of our Rights

When Madison was preparing for the introduction into the first Congress of a resolution for the addition of a bill of rights to the Constitution, he wrote to Jefferson outlining the arguments he would present. Jefferson agreed but added "the legal check which it puts into the hands of the judiciary." (5 *Documentary History of the Constitution*, 161.) Madison accepted the suggestion, and in his speech accompanying his proposal for what was to become the Bill of Rights, he said:

* * * If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Ex-

17. Even questions once held to be non-justiciable are later adjudicated. Cf. *Colegrove v. Green*, 328 U. S. 549 (1946) with *Baker v. Carr*, *supra*.

ective; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Declaration of Rights. (1 Annals of Congress, 1st Cong. 1st Sess., 439.)

It need hardly be noted that neither Jefferson nor Madison would have excluded the establishment and free exercise provisions of the First Amendment from the legal check which the Bill of Rights put into the hands of the judiciary, or from the guardianship of independent tribunals of justice.

The struggle for religious liberty and against church establishment was the first and most universal of the struggles in the colonies.¹⁸ More than any it led to the inclusion of a Bill of Rights into the Constitution. It would be strange indeed if by reason of a decision of this "independent tribunal of justice" freedom from established religion would alone be beyond the mantle of judicial protection.

D. The Preferred Position of First Amendment Rights

As Judge Frankel pointed out in his dissenting opinion in the court below (44a), this Court has recognized that "the usual rules governing standing" (*Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965)) may require exceptions where First Amendment freedoms are in issue. Substantively, too, this Court has recognized and given effect to the preferred position of First Amendment rights. The usual presumption of constitutionality supporting legislation is balanced, in legislation affecting rights secured by

18. As early as 1644, a tanner named Briscoe in Massachusetts Bay Colony published a pamphlet against the church tax, arguing that such method of supporting religion was immoral and contrary to justice. Cobb, *The Rise of Religious Liberty in America*, p. 170 (1902).

the First Amendment, by "the preferred place given in our scheme to the great freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U. S. 516, 530 (1945); *Marsh v. Alabama*, 326 U. S. 501, 509 (1946); *Prince v. Massachusetts*, 321 U. S. 158, 164 (1944). Ordinarily, if a situation exists requiring legislative action, it is for the legislature and not the courts to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the legislature's act was patently unreasonable. But for legislation abridging liberty secured by the First Amendment, a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins*, *supra*, 323 U. S. at 530. "Mere legislative preference for one rather than another means of combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill v. Alabama*, 310 U. S. 88, 95-96 (1940). See also *Sherbert v. Venner*, 374 U. S. 398, 406 (1963).

Therein lies the crucial difference between the present case and *Frothingham*. Were *Frothingham* to be decided today on the merits, the courts would accord Congress the greatest latitude and would without hesitation uphold its actions since they could not be said to be patently unreasonable. Should the present case reach the merits stage, the legislation and its implementation would be subject to an "exacting judicial scrutiny." *United States v. Carolene Products Company*, 304 U. S. 144, 152 fn. 4 (1938). It would, we submit, be self-contradictory for the

Court on the one hand to impose upon itself an obligation of exacting scrutiny while at the same time to refuse to exercise any scrutiny at all by reason of an equally self-imposed rule of standing.

E. Anomaly in Federalism

Judge Frankel, in his comprehensive dissenting opinion in the court below, pointed to the anomaly in federalism which would result if *Frothingham* were held to bar the present suit. The Constitution expressly forbids Congress from making a law respecting an establishment of religion. It imposes that limitation on the States only indirectly and by implication through the Fourteenth Amendment. It would be strange indeed if, in actual practice, Congress could make such a law but a State could not.

It has been the clear policy of this Court to make uniform the judicial protection accorded to constitutional rights from Federal and State impairment. From *Gitlow v. New York*, 268 U. S. 652 (1925) to *Washington v. Texas*, 37 S. Ct. 1920 (1967), the clear thrust of this Court's decisions has been to make applicable to the States with equal vigor the limitations imposed upon the Federal Government by the Bill of Rights.¹⁹ Conversely, decisions such as *Hurd*

19. There have been dissents. See, Mr. Justice Jackson's dissent in *Beauharnais v. Illinois*, 343 U. S. 250, 287 (1952) and Mr. Justice Harlan's dissent in *Roth v. United States*, 354 U. S. 476 (1957). But these are predicated on the proposition that because the Fourteenth Amendment forbids deprivation of liberty only if it is without due process of law whereas the First Amendment imposes no such qualification, the States should be accorded greater liberality in the regulation of conduct or expression within the ambit of First Amendment protection. But applying *Frothingham* to the establishment clause would have the directly opposite effect; it would accord the Federal Government greater liberality than possessed by the States—a consequence particularly anomalous in view of the fact that under our system of federalism, education is principally the responsibility of the States.

v. *Hodge*, 334 U. S. 24 (1948), *Bolling v. Sharpe*, 347 U. S. 497 (1954), *Wesberry v. Sanders*, *supra*, and *Schneider v. Rusk*, 377 U. S. 163 (1964), all indicate a strong policy that the right to equality under law secured by the Fourteenth Amendment against state infringement shall be no less secured against the Federal Government, and shall in both cases enjoy the same degree of judicial protection. The Court has done this by, in effect, reading the equal protection clause into the Fifth Amendment (*Schneider v. Rusk*, *supra*, 377 U. S. at 168), as it had earlier read the establishment clause into the Fourteenth Amendment (*Everson*, *supra*, 330 U. S. at p. 8).

It would be, we suggest, an anomalous turn in federalism and contrary to the consistent policy of equalizing the meaning and effectuality of our fundamental freedoms if the Court were now in effect to read the establishment clause out of the First Amendment.

F. The Consequence of Abstention

On this motion it must be assumed that the plaintiffs are correct in their assertion that the administration of the Elementary and Secondary Education Act of 1965 in New York and other parts of the nation²⁰ is unconstitutional—unless the complaint is patently frivolous, which the defendants do not, at least to the present, contend. If so, the consequence of denial of plaintiffs' standing to sue in the present case is that the unconstitutional expenditure of hundreds of millions of dollars raised by compulsory taxation of American citizens will go on unchecked. And even if there be doubt as to the validity of the plaintiffs' assertion

20. See fn. 2 and text thereat. *Supra*, p. 4.

respecting the administration of the Act, dismissal of the complaint on the ground that plaintiffs lack standing to sue can only mean that the courts are equally impotent to restrain an outright gift of Federal funds or property to a church.²¹

Refusal of jurisdiction in the present case will make of the establishment clause what Madison called a "parchment barrier."²² It will render meaningless the mandate of the

21. This is by no means beyond the realm of probability. It was only President Madison's veto that prevented the grant of Federally owned land to a Baptist church. 1 Richardson, *Messages and Papers of the Presidents*, 489-490 (1900). Under the Surplus Property Act (40 U.S.C. 484(k)), the Government is at the present time turning over to churches many millions of dollars of Federally owned property as what is practically a gift—i.e., ten percent of its real value. See, *Reynolds School District v. Gardner*, U.S.D.C. Oregon, Civ. Action No. 66-150. This was a suit brought jointly by a public school district and taxpayers challenging a proposed conveyance of surplus land to the Lutheran Church at ten percent of its value. Although the school district, whose application for the same land had been turned down by the Government, would seem to have a non-common interest in the controversy and therefore standing even under *Frothingham*, the Government moved to dismiss for want of standing. The issue was not decided because the controversy was rendered moot by reason of the fact that the Government, on reconsideration, decided that the property was not surplus after all and withdrew the proposed conveyance to the Lutheran Church. (Information from filed papers in the case.)

In 1962, the Government turned over to the Catholic diocese of Long Island some 22 acres of surplus land on what was formerly the Mitchel Field Air Force Base at ten percent of its value. Similar applications by county authorities and by an Episcopalian group and a Jewish group were turned down. Protests and intervention by a United States Senator led to a grant of land to both the Episcopalian group and the Jewish group (for erection of religious schools), but the refusal to sell to the county at less than full value was not changed. See *New York Times*, Nov. 23, 26, 27, 1962; April 4, May 21, 24, 1963. January 18, 1964; U. S. Congress, Senate, Committee on Government Operations, Hearings on Negotiated Sale of Mitchel Field, 88th Cong., 1st Sess., 1963.

22. Letter of Madison to Jefferson, October 17, 1788 in 5 *Documentary History of the Constitution* 86.

First Amendment that "Congress shall make no law respecting an establishment of religion", at least in the area in which it has always been deemed most relevant—the use of tax raised funds to support religious institutions. Indeed, it is not too much to suggest that the consequence of a decision holding that *Frothingham* bars the present suit would in practical effect be the repeal of that freedom which this Court has said (in *Abington School District v. Schempp*, *supra*, 374 U. S. at 216) "was first in the Bill of Rights because it was first in the forefathers' minds"—freedom from an establishment of religion.

Conclusion

Mr. Justice Rutledge warned in *Everson*:

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. * * * In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other. (330 U. S. at 63.)

This Court has been strict in keeping untarnished that part of the establishment side of the religious freedom shield which relates to religious education and observances in the public school. It has been able to do so by setting aside technical legalisms founded upon concepts of standing to sue and *de minimis*. (See, *McCollum, Engel v. Vitale*, and *Abington School District v. Schempp, supra*. See, also, Sutherland, *Due Process and Disestablishment*, 62 Harv. L. Rev. 1343 (1949), and Sutherland, *Establishment According to Engel*, 76 Harv. L. Rev. 25 (1962).) To check the parallel drive to obtain public funds for the aid and support of religious schools and keep equally untarnished that part of the shield relating to the ban on financing religion through tax-raised funds, the Court, we submit, must be equally strict in refusing to allow similar technical legalisms of standing and *de minimis* to bar the way to substantive determination of the issues raised in this suit. The Court, in sum, must reverse the decision of the court below and remand the case for a trial on the merits.

Respectfully submitted,

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APPENDIX

Excerpts from Elementary and Secondary Education Act of 1965

Title I—Financial Assistance to Local Educational Agencies for the Education of Children of Low- Income Families and Extension of Public Law 874, Eighty-First Congress

SEC. 2. The Act of September 30, 1950, Public Law 874, Eighty-first Congress, as amended (20 U.S.C. 236-244), is amended by inserting:

"Title I—Financial Assistance for Local Educational Agencies in Areas Affected by Federal Activity"

immediately above the heading of section 1, by striking out "this Act" wherever it appears in sections 1 through 6, inclusive (other than where it appears in clause (B) of section 4(a)), and inserting in lieu thereof "this title", and by adding immediately after section 6 the following new title:

"Title II—Financial Assistance to Local Educational Agencies for the Education of Children of Low-Income Families

"DECLARATION OF POLICY

"SEC. 201. In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in this title) to local educational agencies serving areas with concentrations of children from low-income

families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

"KINDS AND DURATION OF GRANTS

"SEC. 202. The Commissioner shall, in accordance with the provisions of this title, make payments to State educational agencies for basic grants to local educational agencies for the period beginning July 1, 1965, and ending June 30, 1968, and he shall make payments to State educational agencies for special incentive grants to local educational agencies for the period beginning July 1, 1966, and ending June 30, 1968.

"BASIC GRANTS—AMOUNT AND ELIGIBILITY

"SEC. 203. (a)(1) From the sums appropriated for making basic grants under this title for a fiscal year, the Commissioner shall reserve such amount, but not in excess of 2 per centum thereof, as he may determine and shall allot such amount among Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands according to their respective need for such grants. The maximum basic grant which a local educational agency in Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands shall be eligible to receive shall be determined pursuant to such criteria as the Commissioner determines will best carry out the purposes of this title.

"(2) In any case in which the Commissioner determines that satisfactory data for that purpose are available, the maximum basic grant which a local educational agency in a State shall be eligible to receive under this title for any fiscal year shall be (except as provided in paragraph (3)) an amount equal to the Federal percentage (established pursuant to subsection (c)) of the average per pupil ex-

penditure in that State multiplied by the sum of (A) the number of children aged five to seventeen, inclusive, in the school district of such agency, of families having an annual income of less than the low-income factor (established pursuant to subsection (c)), and (B) the number of children of such ages in such school district of families receiving an annual income in excess of the low-income factor (as established pursuant to subsection (c)) from payments under the program of aid to families with dependent children under a State plan approved under title IV of the Social Security Act. In any other case, the maximum basic grant for any local educational agency in a State shall be determined on the basis of the aggregate maximum amount of such grants for all such agencies in the county or counties in which the school district of the particular agency is located, which aggregate maximum amount shall be equal to the Federal percentage of such per pupil expenditure multiplied by the number of children of such ages and families in such county or counties and shall be allocated among those agencies upon such equitable basis as may be determined by the State educational agency, in accordance with basic criteria prescribed by the Commissioner. For purposes of this subsection the 'average per pupil expenditure' in a State shall be the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made, of all local educational agencies in the State (without regard to the sources of funds from which such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year. In determining the maximum amount of a basic grant and the eligibility of a local educational agency for a basic grant for any fiscal year, the number of children determined under the first two sentences of this subsection or under subsection (b) shall be reduced by the number of children aged five to seventeen, inclusive, of families having an annual income of less than the low-

income factor (as established pursuant to subsection (c)) for whom a payment was made under title I for the previous fiscal year.

“(3) If the maximum amount of the basic grant determined pursuant to paragraph (1) or (2) for any local educational agency for the fiscal year ending June 30, 1966, is greater than 30 per centum of the sum budgeted by that agency for current expenditures for that year (as determined pursuant to regulations of the Commissioner), such maximum amount shall be reduced to 30 per centum of such budgeted sum.

“(4) For purposes of this subsection, the term ‘State’ does not include Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

“(b) A local educational agency shall be eligible for a basic grant for a fiscal year under this title only if it meets the following requirements with respect to the number of children aged five to seventeen, inclusive, of families having an annual income of less than the low-income factor (as established pursuant to subsection (c)):

“(1) In any case (except as provided in paragraph (3)) in which the Commissioner determines that satisfactory data for the purpose of this subsection as to the number of such children of such families are available on a school district basis, the number of such children of such families in the school district of such local educational agency shall be—

“(A) at least one hundred, or

“(B) equal to 3 per centum or more of the total number of all children aged five to seventeen, inclusive, in such district,

whichever is less, except that it shall in no case be less than ten.

"(2) In any other case, except as provided in paragraph (3), the number of children of such ages of families with such income in the county which includes such local educational agency's school district shall be one hundred or more.

"(3) In any case in which a county includes a part of the school district of the local educational agency concerned and the Commissioner has not determined that satisfactory data for the purpose of this subsection are available on a school district basis for all the local educational agencies for all the counties into which the school district of the local educational agency concerned extends, the eligibility requirement with respect to the number of children of such ages of families of such income for such local educational agency shall be determined in accordance with regulations prescribed by the Commissioner for the purposes of this subsection.

"(c) For the purposes of this section, the 'Federal percentage' and the 'low-income factor' for the fiscal year ending June 30, 1966, shall be 50 per centum and \$2,000 respectively. For each of the two succeeding fiscal years the Federal percentage and the low-income factor shall be established by the Congress by law.

"(d) For the purposes of this section, the Commissioner shall determine the number of children aged five to seventeen, inclusive, of families having an annual income of less than the low-income factor (as established pursuant to subsection (c)) on the basis of the most recent satisfactory data available from the Department of Commerce. At any time such data for a county are available in the Department of Commerce, such data shall be used in making calculations under this section. The Secretary of Health, Education and Welfare shall determine the number of children of such ages from families receiving an annual income in ex-

cess of the low-income factor (established pursuant to subsection (c)) from payments under the program of aid to families with dependent children under a State plan approved under title IV of the Social Security Act on the basis of the best available data for the period most nearly comparable to those which are used by the Commissioner under the first two sentences of this subsection in making determinations for the purposes of subsections (a) and (b). When requested by the Commissioner, the Secretary of Commerce shall make a special estimate of the number of children of such ages who are from families having an annual income less than the low-income factor (established pursuant to subsection (c)) in each county or school district, and the Commissioner is authorized to pay (either in advance or by way of reimbursement) the Secretary of Commerce the cost of making this special estimate. The Secretary of Commerce shall give consideration to any request of the chief executive of a State for the collection of additional census information.

"SPECIAL INCENTIVE GRANTS

"SEC. 204. Each local educational agency which is eligible to receive a basic grant for the fiscal year ending June 30, 1967, shall be eligible to receive in addition a special incentive grant which does not exceed the product of (a) the aggregate number of children in average daily attendance to whom such agency provided free public education during the fiscal year ending June 30, 1965, and (b) the amount by which the average per pupil expenditure of that agency for the fiscal year ending June 30, 1965, exceeded 105 per centum of such expenditure for the fiscal year ending June 30, 1964. Each local educational agency which is eligible to receive a basic grant for the fiscal year ending June 30, 1968, shall be eligible to receive in addition a special incentive grant which does not exceed the product of (c) the aggregate number of children in average daily attendance to whom such agency provided free public educa-

tion during the fiscal year ending June 30, 1966, and (d) the amount by which the average per pupil expenditure of that agency for the fiscal year ending June 30, 1966, exceeded 110 per centum of such expenditure for the fiscal year ending June 30, 1964. For the purpose of this section the 'average per pupil expenditure' of a local educational agency for any year shall be the aggregate expenditures (without regard to the sources of funds from which such expenditures are made, except that funds derived from Federal sources shall not be used in computing such expenditures) from current revenues made by that agency during that year for free public education, divided by the aggregate number of children in average daily attendance to whom such agency provided free public education during that year.

"APPLICATION

"SEC. 205. (a) A local educational agency may receive a basic grant or a special incentive grant under this title for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—

"(1) that payments under this title will be used for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting those needs, and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly operated programs and projects under this title;

"(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;

"(3) that the local educational agency has provided satisfactory assurance that the control of funds provided under this title, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this title, and that a public agency will administer such funds and property;

"(4) in the case of any project for construction of school facilities, that the project is not inconsistent with overall State plans for the construction of school facilities and that the requirements of section 209 will be complied with on all such construction projects;

"(5) that effective procedures, including provision for appropriate objective measurements of educational achievement, will be adopted for evaluating at least annually the effectiveness of the programs in meeting the special educational needs of educationally deprived children;

"(6) that the local educational agency will make an annual report and such other reports to the State educational agency, in such form and containing such information, as may be reasonably necessary to enable the State educational agency to perform its duties under this title, including information relating to the educational achievement of students participating in programs carried out under this title, and will keep such records and afford such access thereto as the

State educational agency may find necessary to assure the correctness and verification of such reports;

“(7) that wherever there is, in the area served by the local educational agency, a community action program approved pursuant to title II of the Economic Opportunity Act of 1964 (Public Law 88-452), the programs and projects have been developed in cooperation with the public or private nonprofit agency responsible for the community action program; and

“(8) that effective procedures will be adopted for acquiring and disseminating to teachers and administrators significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices developed through such projects.

“(b) The State educational agency shall not finally disapprove in whole or in part any application for funds under this title without first affording the local educational agency submitting the application reasonable notice and opportunity for a hearing.

“ASSURANCES FROM STATES

“SEC. 206. (a) Any State desiring to participate in the program of this title shall submit through its State educational agency to the Commissioner an application, in such detail as the Commissioner deems necessary, which provides satisfactory assurance—

“(1) that, except as provided in section 207(b), payments under this title will be used only for programs and projects which have been approved by the State educational agency pursuant to section 205(a) and which meet the requirements of that section, and that such agency will in all other respects comply with the provisions of this title, including the enforcement

of any obligations imposed upon a local educational agency under section 205(a);

“(2) that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid to the State (including such funds paid by the State to local educational agencies) under this title; and

“(3) that the State educational agency will make to the Commissioner (A) periodic reports (including the results of objective measurements required by section 205(a)(5) evaluating the effectiveness of payments under this title and of particular programs assisted under it in improving the educational attainment of educationally deprived children, and (B) such other reports as may be reasonably necessary to enable the Commissioner to perform his duties under this title (including such reports as he may require to determine the amounts which the local educational agencies of that State are eligible to receive for any fiscal year), and assurance that such agency will keep such records and afford such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports.

“(b) The Commissioner shall approve an application which meets the requirements specified in subsection (a), and he shall not finally disapprove an application except after reasonable notice and opportunity for a hearing to the State educational agency.

“PAYMENT

“SEC. 207. (a)(1) The Commissioner shall, subject to the provisions of section 208, from time to time pay to each State, in advance or otherwise, the amount which the local

educational agencies of that State are eligible to receive under this title. Such payments shall take into account the extent (if any) to which any previous payment to such State educational agency under this title (whether or not in the same fiscal year) was greater or less than the amount which should have been paid to it.

“(2) From the funds paid to it pursuant to paragraph (1) each State educational agency shall distribute to each local educational agency of the State which is not ineligible by reason of section 203(b) and which has submitted an application approved pursuant to section 205(a) the amount for which such application has been approved, except that this amount shall not exceed an amount equal to the total of the maximum amount of the basic grant plus the maximum amount of the special incentive grant as determined for that agency pursuant to sections 203 and 204, respectively.

“(b) The Commissioner is authorized to pay to each State amounts equal to the amounts expended by it for the proper and efficient performance of its duties under this title (including technical assistance for the measurements and evaluations required by section 205(a)(5)), except that the total of such payments in any fiscal year shall not exceed 1 per centum of the total of the amount of the basic grants paid under this title for that year to the local educational agencies of the State.

“(c) (1) No payments shall be made under this title for any fiscal year to a State which has taken into consideration payments under this title in determining the eligibility of any local educational agency in that State for State aid, or the amount of that aid, with respect to the free public education of children during that year or the preceding fiscal year.

"(2) No payments shall be made under this title to any local educational agency for any fiscal year unless the State educational agency finds that the combined fiscal effort (as determined in accordance with regulations of the Commissioner) of that agency and the State with respect to the provision of free public education by that agency for the preceding fiscal year was not less than such combined fiscal effort for that purpose for the fiscal year ending June 30, 1964.

"ADJUSTMENTS WHERE NECESSITATED BY APPROPRIATIONS

"SEC. 208. If the sums appropriated for the fiscal year ending June 30, 1966, for making the payments provided in this title are not sufficient to pay in full the total amounts which all local and State educational agencies are eligible to receive under this title for such year, such amounts shall be reduced ratably. In case additional funds become available for making payments under this title for that year, such reduced amounts shall be increased on the same basis that they were reduced.

"LABOR STANDARDS

"SEC. 209. All laborers and mechanics employed by contractors or subcontractors on all construction projects assisted under this title shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a—276a-5). The Secretary of Labor shall have with respect to the labor standards specified in this section the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 5 U.S.C. 133z-15) and section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 276c).

“WITHHOLDING

“SEC. 210. Whenever the Commissioner, after reasonable notice and opportunity for hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 206(b), the Commissioner shall notify the agency that further payments will not be made to the State under this title (or, in his discretion, that the State educational agency shall not make further payments under this title to specified local educational agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, no further payments shall be made to the State under this title, or payments by the State educational agency under this title shall be limited to local educational agencies not affected by the failure, as the case may be.

“JUDICIAL REVIEW

“SEC. 211. (a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its application submitted under section 206(a) or with his final action under section 210, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

“(b) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of

fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

“(c) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

“NATIONAL ADVISORY COUNCIL

“SEC. 212. (a) The President shall, within ninety days after the enactment of this title, appoint a National Advisory Council on the Education of Disadvantaged Children for the purpose of reviewing the administration and operation of this title, including its effectiveness in improving the educational attainment of educationally deprived children, and making recommendations for the improvement of this title and its administration and operation. These recommendations shall take into consideration experience gained under this and other Federal educational programs for disadvantaged children and, to the extent appropriate, experience gained under other public and private educational programs for disadvantaged children.

“(b) The Council shall be appointed by the President without regard to the civil service laws and shall consist of twelve persons. When requested by the President, the Secretary of Health, Education, and Welfare shall engage such technical assistance as may be required to carry out the functions of the Council, and the Secretary shall make available to the Council such secretarial, clerical, and other assistance and such pertinent data prepared by the Department of Health, Education, and Welfare as it may require to carry out such functions.

“(c) The Council shall make an annual report of its findings and recommendations (including recommendations for changes in the provisions of this title) to the President not later than March 31 of each calendar year beginning after the enactment of this title. The President shall transmit each such report to the Congress together with his comments and recommendations.

“(d) Members of the Council who are not regular full-time employees of the United States shall, while serving on business of the Council, be entitled to receive compensation at rates fixed by the President, but not exceeding \$100 per day, including travel time; and while so serving away from their homes or regular places of business, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5 of the Administrative Expenses Act of 1946 (5 U.S.C. 73b-2) for persons in Government service employed intermittently.”

• • •

Title II—School Library Resources, Textbooks, and Other Instructional Materials

APPROPRIATIONS AUTHORIZED

SEC. 201. (a) The Commissioner shall carry out during the fiscal year ending June 30, 1966, and each of the four succeeding fiscal years, a program for making grants for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools.

(b) For the purpose of making grants under this title, there is hereby authorized to be appropriated the sum of \$100,000,000 for the fiscal year ending June 30, 1966; but for the fiscal year ending June 30, 1967, and the three succeeding fiscal years, only such sums may be appropriated as the Congress may hereafter authorize by law.

ALLOTMENT TO STATES

SEC. 202. (a) From the sums appropriated for carrying out this title for any fiscal year, the Commissioner shall reserve such amount, but not in excess of 2 per centum thereof, as he may determine and shall allot such amount among the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands according to their respective needs for assistance under this title. From the remainder of such sums, the Commissioner shall allot to each State an amount which bears the same ratio to such remainder as the number of children enrolled in the public and private elementary and secondary schools of that State bears to the total number of children enrolled in such schools in all of the States. The number of children so enrolled shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him. For purposes of this subsec-

tion, the term "State" shall not include the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) The amount of any State's allotment under subsection (a) for any fiscal year which the Commissioner determines will not be required for such fiscal year shall be available for reallocation from time to time, on such dates during such year as the Commissioner may fix, to other States in proportion to the original allotments to such States under subsection (a) for that year but with such proportionate amount for any of such other States being reduced to the extent it exceeds the sum the Commissioner estimates such State needs and will be able to use for such year; and the total of such reductions shall be similarly reallocated among the States whose proportionate amounts were not so reduced. Any amount reallocated to a State under this subsection during a year from funds appropriated pursuant to section 201 shall be deemed part of its allotment under section (a) for such year.

STATE PLANS

SEC. 203. (a) Any State which desires to receive grants under this title shall submit to the Commissioner a State plan, in such detail as the Commissioner deems necessary, which—

(1) designates a State agency which shall, either directly or through arrangements with other State or local public agencies, act as the sole agency for administration of the State plan;

(2) sets forth a program under which funds paid to the State from its allotment under section 202 will be expended solely for (A) acquisition of library resources (which for the purposes of this title means books, periodicals, documents, audio-visual materials, and other related library materials), textbooks, and

other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools in the State, and (B) administration of the State plan, including the development and revision of standards relating to library resources, textbooks, and other printed and published instructional materials furnished for the use of children and teachers in the public elementary and secondary schools of the State, except that the amount used for administration of the State plan shall not exceed for the fiscal year ending June 30, 1966, an amount equal to 5 per centum of the amount paid to the State under this title for that year, and for any fiscal year thereafter an amount equal to 3 per centum of the amount paid to the State under this title for that year;

(3) sets forth the criteria to be used in allocating library resources, textbooks, and other printed and published instructional materials provided under this title among the children and teachers of the State, which criteria shall—

(A) take into consideration the relative need of the children and teachers of the State for such library resources, textbooks, or other instructional materials, and

(B) provide assurance that to the extent consistent with law such library resources, textbooks, and other instructional materials will be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools in the State which comply with the compulsory attendance laws of the State or are otherwise recognized by it through some procedure customarily used in the State;

(4) sets forth the criteria to be used in selecting the library resources, textbooks, and other instruc-

tional materials to be provided under this title and for determining the proportions of the State's allotment for each fiscal year which will be expended for library resources, textbooks, and other printed and published instructional materials, respectively, and the terms by which such library resources, textbooks, and other instructional materials will be made available for the use of children and teachers in the schools of the State;

(5) sets forth policies and procedures designed to assure that Federal funds made available under this title for any fiscal year will be so used as to supplement and, to the extent practical, increase the level of State, local, and private school funds that would in the absence of such Federal funds be made available for library resources, textbooks, and other printed and published instructional materials, and in no case supplant such State, local and private school funds;

(6) sets forth such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid to the State (including any such funds paid by the State to any other public agency) under this title; and

(7) provides for making such reports, in such form and containing such information, as the Commissioner may reasonably require to carry out his functions under this title, and for keeping such records and for affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports.

(b) The Commissioner shall approve any State plan and any modification thereof which complies with the provisions of subsection (a).

PAYMENTS TO STATES

SEC. 204. (a) From the amounts allotted to each State under section 202 the Commissioner shall pay to that State an amount equal to the amount expended by the State in carrying out its State plan. Such payments may be made in installments, and in advance or by way of reimbursement, with necessary adjustments on account of overpayments or underpayments.

(b) In any State which has a State plan approved under section 203(b) and in which no State agency is authorized by law to provide library resources, textbooks, or other printed and published instructional materials for the use of children and teachers in any one or more elementary or secondary schools in such State, the Commissioner shall arrange for the provision on an equitable basis of such library resources, textbooks, or other instructional materials for such use and shall pay the cost thereof for any fiscal year ending prior to July 1, 1970, out of that State's allotment.

PUBLIC CONTROL OF LIBRARY RESOURCES, TEXTBOOKS, AND OTHER INSTRUCTIONAL MATERIAL AND TYPES WHICH MAY BE MADE AVAILABLE

SEC. 205. (a) Title to library resources, textbooks, and other printed and published instructional materials furnished pursuant to this title, and control and administration of their use, shall vest only in a public agency.

(b) The library resources, textbooks, and other printed and published instructional materials made available pursuant to this title for use of children and teachers in any school in any State shall be limited to those which have been approved by an appropriate State or local educational authority or agency for use, or are used, in a public elementary or secondary school of that State.

ADMINISTRATION OF STATE PLANS

SEC. 206. (a) The Commissioner shall not finally disapprove any State plan submitted under this title, or any modification thereof, without first affording the State agency administering the plan reasonable notice and opportunity for a hearing.

(b) Whenever the Commissioner, after reasonable notice and opportunity for hearing to such State agency, finds—

(1) that the State plan has been so changed that it no longer complies with the provisions of section 203 (a), or

(2) that in the administration of the plan there is a failure to comply substantially with any such provisions,

the Commissioner shall notify such State agency that the State will not be regarded as eligible to participate in the program under this title until he is satisfied that there is no longer any such failure to comply.

JUDICIAL REVIEW

SEC. 207. (a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its State plan submitted under section 203(a) or with his final action under section 206(b), such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

(b) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) The court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

NOV 29 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D.
HENKIN, FRANK ABRAMS, C. IRVING DWORK,
FLORINE LEVIN AND HELEN L. BUTTENWIESER,
Appellants,

AGAINST

JOHN W. GARDNER, AS SECRETARY OF THE DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES,
AND HAROLD HOWE, 2D, AS COMMISSIONER OF EDUCA-
TION OF THE UNITED STATES,

Appellees.

BRIEF OF COUNCIL OF CHIEF STATE SCHOOL OF-
FICERS, AMERICAN ASSOCIATION OF SCHOOL
ADMINISTRATORS, NATIONAL SCHOOL BOARDS
ASSOCIATION, NATIONAL ASSOCIATION OF
STATE BOARDS OF EDUCATION AND THE HOR-
ACE MANN LEAGUE OF THE UNITED STATES
OF AMERICA, INC., amici curiae.

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| Sutherland, <i>Establishment According to Engel</i> , 76 Harv. L. Rev. 25 (1962) | 17, 18, 19 |
| Symposium, 12 Buffalo L. Rev. 35 (1962) | 10 |
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D.
HENKIN, FRANK ABRAMS, C. IRVING DWORK,
FLORINE LEVIN AND HELEN L. BUTTENWIESER,
Appellants,

AGAINST

JOHN W. GARDNER, AS SECRETARY OF THE DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES,
AND HAROLD HOWE, 2d, AS COMMISSIONER OF EDUCA-
TION OF THE UNITED STATES,

Appellees.

BRIEF OF COUNCIL OF CHIEF STATE SCHOOL OF-
FICERS, AMERICAN ASSOCIATION OF SCHOOL
ADMINISTRATORS, NATIONAL SCHOOL BOARDS
ASSOCIATION, NATIONAL ASSOCIATION OF
STATE BOARDS OF EDUCATION AND THE HOR-
ACE MANN LEAGUE OF THE UNITED STATES
OF AMERICA, INC., amici curiae.

STATUTE INVOLVED

The statutory provisions involved in this suit are Titles
I and II of the Elementary and Secondary Education Act
of 1965.

THE QUESTION PRESENTED

Does the instant suit present a case or controversy, involving issues appropriate for judicial resolution, which appellants have standing to bring?

INTEREST OF THE AMICI CURIAE

Each of the *amici curiae* is an association or organization intimately concerned with the preservation, protection and promotion of public primary and secondary school education. Each of these *amici curiae* is deeply committed to the primacy of public education as the bedrock of our democratic order. These *amici* oppose direct government aid to religious, parochial schools, pursuant to the Elementary and Secondary Education Act of 1965, because such aid seriously jeopardizes the primacy of public education and breaches the First Amendment's wall of separation between church and state.

Council of Chief State School Officers

Established in 1928, the Council is an organization of state superintendents and commissioners of education, entirely independent of any other professional or official organization. Its membership includes the chief school officers of the fifty states and also the heads of the public education agencies in American Samoa, the Panama Canal Zone, Guam, Puerto Rico, the Trust Territory of the Pacific Islands and the Virgin Islands.

American Association of School Administrators

The American Association of School Administrators, first organized in 1865 as the National Association of School Superintendents, with an initial membership of 50 state and city superintendents, currently has a membership of 17,000. It is a professional organization which promotes development of competent administrative leadership for schools

and provides the means for this leadership to give unified expression to the goals and values in education.

The Association's current policy on the separation of church and state is:

"The concept of separation of church and state, which postulates that the resources of the state shall not be used to support any religious group or persuasion, continues to be an imperative in the American form of government. This Association reaffirms its long-standing policy that public tax monies should not be expended for nonpublic educational institutions. On the basis of the increasing goodwill shown among the various faiths and between the public and nonpublic school systems, we further recommend that the services of the public schools be made available, within the public schools, to all children. The AASA recommends that all school administrators seek to strengthen common understandings in the interest of all the children attending schools in America."

National School Boards Association

The National School Boards Association is composed of State School Boards Associations in all the states. The State Associations in turn, are composed of all the local school boards within the respective states. As so federated, the Public School Boards of America believe that "education is the bulwark of freedom" and that our universal system of free public education is literally the nation's first line of defense and the greatest constructive force of the American people for the preservation of their freedoms and advancement of the democratic way of life. The NSBA has taken official positions expressing concern about the "serious uncertainties of utilizing public funds for non-public school purposes."

*National Association of State
Boards of Education*

This Association is composed of the constitutional and statutory boards of education in the states which have general supervisory responsibility for education. These boards have powers and exercise responsibilities which vary greatly from state to state, but which include in every state general supervisory authority over the elementary and secondary public schools of the state.

*The Horace Mann League of the
United States of America*

The Horace Mann League is a non-profit educational and charitable corporation organized and operated for the purpose of fostering and strengthening the American public school system. It was the moving force in the case of *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A. 2d 51 (1966), *cert. denied*, *app. dismissed*, 385 U.S. 97, in which the Maryland Court of Appeals voided, on Establishment Clause grounds, direct grants-in-aid from the State of Maryland to certain church-related institutions of higher education. The nationwide membership of the League includes a large number of college presidents and deans, chief state school officers, city and county school superintendents, and other educational authorities.

The platform of the League is reproduced in the margin.*

* "The Horace Mann League exists to perpetuate the ideals of Horace Mann, the founder of the American public school system. Its basic purposes and activities are to strengthen our public schools. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a most necessary unifying and dynamic influence in American life. According to the League's beliefs, our public schools should be free, classless, nonsectarian, and open to all of the children of all of the people. The schools should be dominated by

STATEMENT OF THE CASE

This class action was brought by a group of individuals to challenge the constitutionality, under the First Amendment, of certain expenditures made by the United States Department of Health, Education and Welfare. Since the District Court granted a motion to dismiss, the allegations of the complaint must be taken as true for the purposes of this appeal.

The appellants are citizens and taxpayers of the United States, and residents of and qualified voters in the City and State of New York. Appellant Helen D. Henkin has children regularly registered in and attending the elementary or secondary grades in the public schools of New York. The appellants allege that the expenditures in question, purportedly made pursuant to the authority of the Elementary and Secondary Education Act of 1965, were for furnishing instructional materials for use in

such purposes as will insure the preparation of children and youth for effective citizenship in our democracy.

The League recognizes the moral and spiritual values of religion in American life, and believes the public school has a responsibility to develop moral and spiritual values. The League believes that the American tradition of separation of church and state must be preserved inviolate and should be most vigorously and zealously safeguarded. The League grants the right of special interest groups, including various religious sects, to maintain their own schools so long as such schools meet the standards defined by the states in which they are located. The League believes that these separate or non-public schools should be financed entirely by their supporters and is therefore unalterably opposed to proposals to devote public funds either to the direct or to the indirect support of such schools.

The League favors the generous financial support of the public schools by local, state, and federal funds. It believes, however, that federal grants should be so made that there will be no federal control or interference in the administration, curriculum, personnel, and instructional procedures of local school systems.

The League seeks the active support of those educators and laymen who are committed to the ideals of Horace Mann and who believe in the aims and policies set forth in this platform."

religious and sectarian schools, to the detriment of programs of public education in the City of New York. These expenditures and the law upon which they are based, the appellants contend violate the First Amendment to the United States Constitution in that they constitute an establishment of religion and further, "in that they prohibit the free exercise of religion on the part of the plaintiffs and the class they represent by reason of the fact that they constitute compulsory taxation for religious purposes" in derogation of the plaintiffs' conscientious objections. Complaint paragraphs 16, 17.

The three judge District Court below granted the appellees' motion to dismiss solely on the ground that, by reason of this Court's decision in *Frothingham v. Mellon*, 262 U.S. 447, the appellants had no standing to bring the action, therefore there was thus no justiciable controversy and the court lacked jurisdiction over the subject matter. From this final order, direct appeal was taken to this Court.

SUMMARY OF ARGUMENT

The judges in the majority below ruled that it follows from the 1923 decision of this Court in *Frothingham v. Mellon*, 262 U.S. 447, that the instant suit must be dismissed because the appellants lack the requisite standing to sue.

These *amici curiae* support the appellants' contentions that this suit presents a case or controversy, involving issues appropriate for judicial resolution, which the appellants have standing to bring.

I.

Frothingham v. Mellon was a case involving a suit brought by a single federal taxpayer, solely in her capacity as a taxpayer, to enjoin certain appropriations of federal

funds, solely on the grounds that (a) the power to make the appropriations in question was never conferred by the Constitution on the federal government, 262 U.S. at 477 (extract from argument) and (b) the appropriations invaded the reserved powers and sovereignty of the states. The instant case differs from *Frothingham* in at least three essential respects. First, most of the potential inconveniences to the federal government and courts, which the ruling in *Frothingham* was designed to protect against, are now eliminated by the Federal Rules of Civil Procedure, which provide for class actions and other joinder devices, thereby protecting the federal courts and the government's spending programs against a multiplicity of taxpayers' suits. Other procedural developments since *Frothingham* afford similar protection to this Court. Second, unlike the situation in *Frothingham* and virtually every case to which its doctrine was subsequently applied, the interest of these appellants is more than the economic interest of taxpayers in their tax bills; the interest here involves a claim of preferred, personal, First Amendment rights fundamental to the nature of the democratic order. Third, unlike the situation in *Frothingham*, the instant case does not involve considerations of federalism; and to the extent that *Frothingham* was bottomed on the political question doctrine, subsequent decisions have undercut its authority. In short, this case presents a justiciable and not a political question.

II.

The trend of authority since *Frothingham* has been to relax the rigidity of standing requirements and to entertain jurisdiction in cases previously thought to be beyond judicial competence. The recent authorities, in fact, favor standing in the instant case, involving as it does a claim under the Establishment Clause. See *Everson v. Board of Education*, 330 U.S. 1; *Engel v. Vitale*, 370 U.S. 421; *Abing-*

ton School District v. Schempp, 374 U.S. 203; *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A. 2d 51 (1966), *cert. denied*, *app. dismissed*, 385 U.S. 97. Each of these cases involved state and local expenditures claimed to be in derogation of the Establishment Clause. Each of the claims was heard. As Professor Jaffe has pointed out, it would be a "crowning paradox" if the constitutionality, under the Establishment Clause, of state and local, but not federal, expenditures can be adjudicated by the Supreme Court at the instance of a taxpayer-citizen, since (1) the expenditure in each instance is claimed to violate the First Amendment, which, historically and textually, was a restraint on the federal government and not the states; (2) the interest of a federal taxpayer is generally quantitatively as great as that of a state taxpayer, if not substantially greater; and (3) the entire concept of a taxpayer's suit, at the local as well as the national level, is "a fiction."

Fortunately, this Court need not announce any such paradox as law. The recent Establishment Clause cases involving state practices, particularly *Engel* and *Abington*, make it crystal clear that *Frothingham's* restrictions do not apply more broadly than to fiscal claims of taxpayers whose only personal interest is in the size of their tax bills. In *Abington*, standing was found to exist where the plaintiffs were parents of school children attending schools where prayers were said, and therefore the state's resources were expended in direct support of religion. The absence of coercion was expressly held to be immaterial. Standing was defined to include persons whose sensibilities were directly affected, and without regard to their actual financial interest. As *Doremus v. Board of Education*, 342 U.S. 429, establishes, these standards for determining standing are equally applicable to suits by federal and state taxpayer-citizens.

III.

Reason and sound public policy favor the exercise of jurisdiction in this case which arises under the First Amendment. As the satisfactory experience of the states that entertain taxpayers' suits indicates, such jurisdiction here would open no Pandora's box. All the purposes of standing are met in this case. The instant case obviously has the necessary measure of "concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204. This is no feigned suit. This is no suit presenting a hypothetical question of law in an abstract context. It raises no political question. The appellants' interests are real, personal, and deeply felt. These appellants are as appropriate as any to present the First Amendment interests which are at stake in this case; the important issues presented by this case will never be readier for resolution; and indeed delay will be positively harmful. Finally, exercise of jurisdiction in this case is consistent with our society's legitimate expectations and this Court's increased recognition that access to the courts is an essential political activity or right.

ARGUMENT

THIS SUIT PRESENTS A CASE OR CONTROVERSY INVOLVING ISSUES APPROPRIATE FOR JUDICIAL RESOLUTION, WHICH APPELLANTS HAVE STANDING TO BRING.

I. THIS CASE IS ESSENTIALLY DIFFERENT FROM FROTHINGHAM V. MELLON, WHICH IS THEREFORE NOT CONTROLLING.

Frothingham v. Mellon, 262 U.S. 447, was a suit brought by a single federal taxpayer, solely in her capacity as a taxpayer, to enjoin the appropriation of federal funds from the general treasury for the implementation of the Maternity Act of 1921. Mrs. Frothingham, the taxpayer, contended that the appropriations were "for purposes wholly outside of any authority or power conferred upon the

Government of the United States by the Constitution," 262 U.S. at 477 (extract of the argument for Mrs. Frothingham), more specifically "for purposes not national, but local to the States" in derogation of the powers reserved to the States under the Tenth Amendment and of the sovereignty of the States. 262 U.S. at 479.

Distinguishing the situations of municipal and state taxpayers, 262 U.S. at 486-87, the Court appeared to hold that the plaintiff had no standing, as a federal income taxpayer, to challenge the validity of the appropriations. The Court's opinion reveals that the decision was based upon the interplay of several considerations. First, in view of the limited development of the law of remedies at that time, the Court found the interest of a federal taxpayer "in the moneys of the Treasury — partly realized from taxation and partly from other sources — is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." 262 U.S. at 487.¹

Second, at a time before this Court was empowered to control its docket by discretionary *certiorari* review, and before the full development of the protective doctrine of the class action, the Court was concerned with problems of administrative and judicial convenience, for it feared that:

"If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review

¹ As to the crucial effect of the undeveloped state of the law of remedies on *Frothingham*, see, e.g., *Judicial Review*, (Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary on S. 2097, U.S. Sen., 89th Cong., 2d Sess., March, 1966) (henceforth cited as *Judicial Review*), Vol. 1, pp. 5, 16, and *passim*; Symposium, 12 Buffalo L. Rev. 35 (1962).

but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained." 262 U.S. at 487.

Third, the Court was concerned with the maintenance of the separation of powers, and was reluctant to decide a "political" question; the Court would not "assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." 262 U.S. 489. See *Massachusetts v. Mellon*, the companion original suit brought by Massachusetts against the Maternity Act appropriations, in which the Court said:

"... [T]he naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent ... [raises a question] that is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power." 262 U.S. at 483.

But cf., e.g., *United States v. Butler*, 297 U.S. 1; *Steward Machine Co. v. Davis*, 301 U.S. 548; *Helvering v. Davis*, 301 U.S. 619 (all entertaining essentially the kind of attacks rejected in *Mellon*).

- A. The instant case is different from *Frothingham* in that most of the inconveniences to the governments' spending programs and to the federal courts which *Frothingham* sought to protect against are now avoided by the Federal Rules of Civil Procedure and the Judges Act of 1925.

Frothingham was a suit by a single taxpayer, solely as taxpayer. It was not a class action, and the present refine-

ments of the class action to preclude vexatious individual suits had not yet occurred. If the Court had entertained Mrs. Frothingham's action, there was reason to fear that the doors might have been opened to separate individual suits by innumerable taxpayers; for at that time there was no well-developed protection like F.R.C.P. 23, which assures that the result in any one suit will foreclose the prosecution of new actions on the same point by others.

There is now no danger of flooding the federal courts with large numbers of individual taxpayers' suits, each of which, to the inconvenience of the government and its spending programs, would have to be defended. The summary judgment (F.R.C.P. 56), the joinder procedure (F.R.C.P. 17-25), and above all, the class suit (F.R.C.P. 23), completely eliminate the dangers of judicial inconvenience feared by the *Frothingham* Court. The instant case is not like *Frothingham*, a suit by a single taxpayer, but a class suit brought "by the plaintiffs, on their own behalf and on behalf of all others similarly situated," who share the conscientious views and scruples of the plaintiffs. (Complaint, paragraph 1).

Under the 1966 amendments to Federal Rules of Civil Procedure 23, governing class actions, there has been a merger of the formerly different kinds of class action, "true," "hybrid," and "spurious," with the express purpose of assuring that "all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class." Moore's Federal Practice Rules Pamphlet 544 (Moore & Fink, Eds. 1966, setting forth the Advisory Committee's comments). Thus, unlike at the time of *Frothingham*, the federal courts, and the governments' spending programs as well, now are pro-

ted by the doctrines of *res judicata* and collateral estoppel, as well as *stare decisis*, from repetitive suits.

One of this Court's latest rulings on standing, set forth in *Swann v. Adams*, 385 U.S. 440, 443, a recent reapportionment decision, indicates the still continuing erosion of the *Frothingham* approach to standing, in cases raising significant civil liberties claims, by the progressive development of the class action as a device for protecting the courts. Justice White, speaking for a unanimous Court on the standing point, said:

"The State would have us dismiss this case for lack of standing on the part of appellants to maintain this appeal because appellants are from Dade County, Florida, which appellants concede has received constitutional treatment under the legislative plan. Appellants, however, had before the District Court their own plan which would have accorded different treatment to Dade County in some respects as compared with the legislative plan, and the alternative plan was rejected by the District Court. Moreover, the District Court has apparently consistently denied intervention to other plaintiffs, seemingly treating the appellants as representing other citizens in the State. The challenge to standing cannot succeed." (Emphasis supplied.)²

Finally, since the Judges' Act of 1925, the Supreme Court's *certiorari* jurisdiction is the great protection of

² See also the Appendix to this brief at p. A1, wherein is reproduced the August 1, 1967 order of a statutory three judge federal district court, in the District of Maryland, denying without prejudice the government's Motion to dismiss based on *Frothingham* in *Seversmith v. Machiz*. The interests of the plaintiffs in *Seversmith* are the same as those of the appellants now before this Court. *Seversmith* involves a challenge, on First Amendment grounds, to Section 511 (a) (2) (A), Internal Revenue Code of 1954, which exempts churches and conventions or associations of churches, from imposition of tax upon their "unrelated business taxable income."

this Court against being flooded by frivolous litigation, and renders *Frothingham* completely inapposite insofar as the decision is based upon any concern for the docket of this Court. When, on the other hand, a non-frivolous challenge is made to a government spending program, a statutory three judge district court ordinarily will be convened, as in the present case. 28 U.S.C. Sections 2282, 2284. The case is then heard by this Court on direct appeal, thereby protecting the government spending program from being tied up during multiple appeals, in the unlikely event that the district court grants an injunction *pendente lite*. Moreover, this Court may protect itself and the federal fiscal program, through summary disposition of cases not raising substantial federal questions.

B. *The interest of the instant appellants is more than the economic interest of taxpayers in the size of their tax bill; it involves a claim of preferred personal First Amendment rights fundamental to the nature of the democratic order.*

In the present case appellants do not resist a tax or ask for restraint of expenditures to save money. They are not concerned solely with the size of their tax bill. Their concern is more one of personal conscience and civic fidelity than of the purse. They seek the redress of a grievance — the use of the machinery of government, and of federal funds in whatever amount to establish sectarian religion. The rights they assert are the right to be free from the onerous and offensive burden of supporting directly or indirectly an establishment of religion and from the abridgment of their own free exercise of religion which results when they are forced to contribute *any* amount to the support of faiths to which they cannot subscribe. For the same reason, this case is different not only from *Mellon*,

but also from all the Supreme Court cases denying standing to challenge federal statutes. *E.g.*, *Alabama Power Co. v. Ickes*, 302 U.S. 464; *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118; see also, *Abbot Laboratories v. Gardner*, 387 U.S. 136, 153-154. As Professor Kauper has pointed out:

"... the Supreme Court has never had occasion squarely to consider the question whether a Federal taxpayer has standing to challenge Federal spending on the ground that it violates an express prohibition such as the establishment limitation as distinguished from the ground that the general purpose of spending is outside the legislative spending power." *Judicial Review*, *supra*, Vol. 2, p. 503.

C. *The instant case does not involve considerations of federalism, or the political question of the separation of powers.*

Unlike *Massachusetts v. Mellon*, the instant case involves no state interests. The right asserted here is a personal right of the plaintiffs guaranteed to each of them, in title of their own personal consciences, by the First Amendment, and not merely a general interest in the maintenance of federalism, which is qualitatively the same for all citizens. Moreover, *Baker v. Carr*, 369 U.S. 186 and its progeny have completely destroyed any barrier to standing based on federalism as a "political question," and the Court's disposition in *Steward Machine Co. v. Davis*, 301 U.S. 548, all but removed separation of powers as an obstacle to standing in a federal spending case like the present. See also, *United States v. Butler*, 297 U.S. 1. Finally, applying the recently refined tests for determining whether a complaint raises a "non-justiciable" or "political question" (*Baker v. Carr*, 369 U.S. 186), it is clear that the Establishment Clause decisions of this Court reveal that the First Amendment is an ample repository of judicially manageable standards and that, in all other respects, this case

presents a question apt for judicial determination. See, e.g., *Everson v. Board of Education*, 330 U.S. 1; *McCollum v. Board of Education*, 333 U.S. 203; *Engel v. Vitale*, 370 U.S. 421; *Abington School District v. Schempp*, 374 U.S. 203; see also, *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A. 2d 51 (1966), *cert. denied*, *app. dismissed*, 385 U.S. 97.

II. THE RECENT AUTHORITIES FAVOR STANDING IN THE INSTANT CASE, WHICH INVOLVES A CLAIM UNDER THE ESTABLISHMENT CLAUSE.

The trend of authority since *Frothingham* has been to relax the rigidity of standing requirements and to entertain jurisdiction in cases previously thought to be beyond judicial competence.

First, this Court has made it clear that in Establishment cases, and in other particularly important areas, standing requirements are less substantial than in cases dealing with purely economic interests. As pointed out by Congressman Celler (111 Cong. Rec. 5930, House, March 26, 1965, Daily Ed.) quoted in *Judicial Review*, *supra*, Vol. 1, pp. 40-41):

"... [I]n recent cases, the Supreme Court has very significantly relaxed what had been believed to be the standards governing standing to sue in controversies over freedom of religion and establishment of religion. Thus in the school prayer cases, the Court reviewed the validity of educational practices at the behest of the parents of children who were affected only in the sense that they might be embarrassed by having to asked to be excused from class during the exercises. There was no pocketbook interest involved, and indeed, there was no legal compulsion requiring the children to be present during the exercises of which their parents sought judicial review.

... In my judgment the Court has, in deference to the great importance of the issues involved in this sphere

of our national life, extended the law of standing to sue to insure that these issues may be resolved in accordance with law and the Constitution."

Even as leading an opponent of the recent Supreme Court decisions as Professor Sutherland concedes (*Establishment According To Engel*, 76 Harv. L. Rev. 25, 39 (1962)) that:

"The right to be free from unconstitutional taxation, to be sure, has not the same overtones as the right to be free from religious oppression. A court could conceivably dismiss a tax case on the ground that the tax minimally affected the plaintiff's rights, and could still refuse to apply *de minimis* to invasions of religious freedom."

The decisions of the Court bear out Congressman Celler's estimate. In *Everson v. Board of Education*, 330 U.S. 1, the Court accorded standing to New Jersey taxpayers to challenge New Jersey expenditures for bus transportation for parochial school students. *Frothingham* was held to be no bar to the jurisdiction of the Court because *Everson* involved a state taxpayer challenging a state appropriation. The unpersuasiveness of the distinction underscores the blow to *Frothingham* struck in the *Everson* opinion. As pointed out by Professor Jaffe, who cites and approves the views of Professor Davis, it would be a "crowning paradox" if the constitutionality, under the Establishment Clause, of state and local expenditures can be adjudicated by the Supreme Court at the instance of a taxpayer-citizen, but not the constitutionality of federal expenditures since, (1) the expenditure in each instance is claimed to violate the First Amendment, which, historically and textually, was a restraint on the federal government and not the states,³ (2) the interest of a federal taxpayer is generally

³ See, Appendix to Jurisdictional Statement, pp. 32-33 (Frankel, J. dissenting below) (henceforth cited Append.)

quantitatively as great as that of a state taxpayer, if not substantially greater,⁴ and (3) the entire concept of a taxpayer's suit, at the local as well as the national level is "a fiction." As Professor Jaffe has said:

"... Even at the local level, the financial impact on the plaintiff is both speculative and minute. . . .

Whatever the tax impact, it does not distinguish the plaintiff from the whole body of taxpayers. He sues not because of a peculiar wrong done to him but quite literally qua taxpayer, a characteristic which he shares with an indeterminate number of his fellows."⁵

But the paradox does not exist, for this Court, while relaxing the requirements for standing has also established that the same standards in fact govern federal and state taxpayers' suits. *Doremus v. Board of Education*, 342 U.S. 429, 433-35, denied standing to challenge in the Supreme Court a state Bible reading requirement, where the plaintiff's child had graduated by the time the case reached the Supreme Court. Justices Douglas, Reed and Burton dissented. Graduation of the plaintiff's child eliminated any direct personal issue of plaintiff's conscience as a parent. The only other interest the plaintiff pressed was his interest as a state taxpayer. Significantly, the Court held that a taxpayer's suit as such, whether state or federal, was governed by *Frothingham*. Since the plaintiff had shown

⁴ The Appendix to this Brief, at pp. 2a-3a contains an elaboration of some available statistical data, bearing upon federal and state taxpayers' quantitative interests in 1922 and 1960, that indicates that the factual premise of the *Frothingham* decision in this respect was and is fallacious.

⁵ Jaffe, *Standing to secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1266, 1293-94 (1961). See also Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353 (1955). Even Professor Sutherland admits the inconsistency and recognizes the negligibility of the "minimal interest" of a state taxpayer, Sutherland, *Establishment According To Engel*, 76 Harv. L. Rev. 25, 45 (1962).

no measurable appropriation or disbursement of school funds which would give him standing under *Everson's* rule that a state taxpayer has the "direct interest" required for taxpayer's suits by *Frothingham*, he was barred from suing. Moreover, in *Doremus* there was no question but that the issue could be pressed conveniently by much more appropriate plaintiffs than were then before the Court; for no parent was before the Court asserting a claim of conscience on behalf of any child immediately subject to the challenged requirement.

Engel v. Vitale, 370 U.S. 421, makes clear that *Doremus* was not intended to restrict standing to challenge First Amendment violations directly affecting an individual plaintiff. The Court pointed out that neither financial interest nor coercion was required as a basis for standing. As Professor Sutherland has observed (*Establishment According To Engel*, 76 Harv. L. Rev. 25, (1962)):

"... [I]n the *Prayer Case* the Court finds no actionable coercion of children to demonstrate dissent; the majority opinion adopts, instead, a quite different formula — that a classroom exercise, if once found to be an 'establishment of religion,' becomes enjoined under the fourteenth amendment, even if no schoolchild is subject to 'coercion,' and even if no plaintiff demonstrates any unconstitutional expenditure of taxpayers' money. One finds asserted in *Engel* no [*Frothingham*] requirement that a litigant, if he would invoke judicial power to forbid governmental action, must show that by it he 'has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.' *Engel* thus suggests that the Supreme Court has somewhat revised its previous ideas concerning 'standing in court,' concerning, that is, the type of grievance a litigant must experience before the federal judiciary will intervene to forbid state governmental activity. The

opinions seem to take as premise a judicial function rather more expanded than most lawyers had come to find usual. Here, rather than in the specific issue decided, may turn out to be the ultimate importance of the case." (76 Harv. L. Rev. at 26-7).

"In the *Prayer Case*, the Supreme Court, finding insufficient jurisdictional hardship imposed on the plaintiffs' children, would conventionally have denied certiorari. Absence of proof that the prayer added to school costs had eliminated the only other possible standing, unless *Doremus* was to be disregarded. But the *School Prayer* opinion did not expressly overrule *Doremus*; one wonders if it was overruled in silence. Is there in *Engel* a new doctrine concerning the wrongs against which the fourteenth amendment, judicially enforced, will protect all persons? Where a state does something amounting to 'establishment,' will the Supreme Court enjoin it on the suit of any member of society who dislikes the policy? And is this new doctrine likely to spread beyond religious establishment to other policy judgments?" (76 Harv. L. Rev. at 35)

In *Abington School District v. Schempp*, 374 U.S. 203, the Court made crystal clear that the restrictions of *Frothingham* do not apply more broadly than to fiscal claims of taxpayers whose only personal interests are in the size of their tax bills. Standing was found to exist in *Abington* where the plaintiffs were parents of school children in schools where the religious exercises were held and the state's resources were expended in direct support of religion. The absence of coercion was expressly held to be immaterial. Standing was broadly defined to include persons whose sensibilities were directly affected by reason of their close connection with the problem, without regard to whether they were taxpayers or not. A taxpayer's suit was clearly established to be not the only footing on which standing could rest. The door closed to plaintiff as a mere taxpayer might be open to him because

he is as well a citizen and parent asserting a claim of conscience under the First Amendment.⁶ And, as *Doremus v. Board of Education*, 342 U.S. 429, establishes, these standards for determining standing are equally applicable to suits by federal and state taxpayer-citizens.

Even apart from the First Amendment cases, there has been an inexorable erosion of the *Frothingham* attitude manifested in the authorities. See, e.g., *Office of Communication of United Church of Christ v. F.C.C.*, 359 F. 2d 994 (D.C. Cir., 1966) (member of viewing public has standing to challenge F.C.C. order); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1282 (1961); Singer, *Church of Christ: Standing and the Evidentiary Hearing*, 55 Geo. L. J. 264 (1966). In the development of substantive (especially tort) as well as procedural law, the courts are more and more protecting interests which had been regarded in the more hardboiled and less sensitive past as too tenuous to be worthy of judicial protection. Cf. *Baker v. Carr*, 369 U.S. 186.

⁶ "It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. *McGowan v. Maryland*, *supra*, [366 U.S. 420] at 429-430. The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain. See *Engel v. Vitale*, *supra*. Cf. *McCullum v. Board of Education*, [333 U.S. 203] *supra*; *Everson v. Board of Education*, *supra*. Compare *Doremus v. Board of Education*, 342 U.S. 429 (1952), which involved the same substantive issues presented here. The appeal was there dismissed upon the graduation of the school child involved and because of the appellants' failure to establish standing as taxpayers." *Abington School District v. Schempp*, *supra*, 374 U.S. at 224, n. 9. See also 374 U.S. at 266-67, n. 30 (Brennan, J., concurring); 374 U.S. at 227-29 (Douglas, J., concurring).

The judicial review legislation which has been on the agenda of Congress in one form or another in recent years does not impair the effect of the foregoing authorities. The bill springs from abundance of caution, and not from Congressional conviction that the law now precludes review. As Congressman Celler urged in opposition to such a bill:

"... I think it is evident that there will be judicial review available as to each and every significant church-state issue that arises under this bill, regardless of whether an explicit provision for such review is made in addition to those already present in the bill." 111 Cong. Rec. p. 5929 (House, March 26, 1965, Daily Ed.); *Judicial Review, supra*, Vol. 2, at p. 41.

Father Drinan, the Dean of the Boston College Law School, reviewing the proposals for legislation, concluded in his article, *Standing to Sue in Establishment Cases*, 1965 RELIGION AND THE PUBLIC ORDER (Giannella, Ed.) 161, 183:

"Whatever conclusions can be drawn from the decisional law of the Supreme Court can perhaps be summed up as follows.

"(1) The Supreme Court from *Everson* to *Schempp* has been generous and non-technical in recognizing the standing to sue of plaintiffs in establishment cases. Barring a sharp reversal of the Court's outlook on the establishment clause, it would appear certain that the Court will continue to follow a policy of liberally extending standing to sue to complainants whose sole grievance is an asserted violation of the establishment clause."

See also, *Judicial Review, supra*, Vol. 2 at p. 505, Statement of Professor Paul G. Kauper, who concludes that "it is possible that the Court at present, even without the aid of a statute, might hold that *Erothingham* does not apply to bar a suit by a Federal taxpayer to challenge Federal spending on the ground it violates the establishment

clause." It may even hold that "*Frothingham* was incorrectly decided and that the Court even without Congressional intervention may reconsider the rule laid down in that case. (See in this connection the separate opinion by Mr. Justice Douglas in *Public Affairs Associates v. Rickover*, 369 U.S. 111, 114.)"

III. REASON AND SOUND PUBLIC POLICY FAVOR THE EXERCISE OF JURISDICTION IN THIS "CASE OR CONTROVERSY" WHICH ARISES UNDER THE FIRST AMENDMENT AND IS IN ALL RESPECTS APT FOR JUDICIAL RESOLUTION.

Apart from the procedural developments discussed earlier in this brief, the expense of litigation and the satisfactory experience with taxpayers' suits, as in effect "public actions," in the state courts assure that entertaining jurisdiction here would open no Pandora's box. See Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961); Note, *Taxpayers' Suits: A Survey and Summary*, 69 Yale L. J. 895 (1960). Moreover, entertaining jurisdiction over this case will not relax, in any respect, the constitutional requirements of "case or controversy" or any other limitations on the jurisdiction of federal courts.

The nature and purpose of standing have been authoritatively set forth by Justice Brennan speaking for the Court in *Baker v. Carr*, 369 U.S. 186, 204:

"Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."

In applying this test, the Court in *Baker v. Carr* held that plaintiffs had standing as representatives of important

general interests despite the fact that the interest of each of them as an individual voter was *de minimis*. As representatives of the class, the plaintiffs were permitted to press the aggregate interests which it is unlikely any of them could have pressed solely as an individual.

Justice Brennan elaborated on "the gist of the question of standing" in his full discussion of standing in the establishment clause context in *Abington School District v. Schempp*, 374 U.S. 203, 267 n. 30:

"Finally, the concept of standing is a necessarily flexible one, designed principally to ensure that the plaintiffs have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. . . .' *Baker v. Carr*, 369 U.S. 186, 204."⁷

The instant case obviously has the necessary measure of "concrete adverseness which sharpens the presentation

⁷ Judge Frankel's application of Justice Brennan's standing concept to this case bears repeating here:

"... [W]hen we deal with the subject of First Amendment freedoms, it is essential to start by recognizing (as Mr. Justice Brennan did in the passage quoted above) that it has fallen to the courts in our system to perform 'the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century. * * *' *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639 (1943). In discharging this responsibility in cases under the First Amendment, the highest Court has observed more than once that effective enforcement of the 'delicate and vulnerable, as well as supremely precious' rights at stake (*N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)) may require exceptions 'to the usual rules governing standing. * * *' *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); see also, *United States v. Raines*, 362 U.S. 17, 22 (1960); *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965)." Append. p. 34 (Frankel, J. dissenting).

of issues." This is no feigned suit. This is no suit presenting a hypothetical question of law in an abstract context. It raises no political question. The plaintiffs' interests are real, personal, and deeply felt. Unlike the plaintiffs in *Doremus v. Board of Education*, 342 U.S. 429, these plaintiffs are as appropriate as any to present the First Amendment interests which are at stake in this case. Note, *Taxpayers' Suits: A Survey and Summary*, 69 Yale L. J. 895, 924 n. 164 (1960). Cf. *Pierce v. Society of Sisters*, 268 U.S. 510; *Barrows v. Jackson*, 346 U.S. 249; *Poe v. Ullman*, 367 U.S. 497, 509 (Brennan, J., Concurring); *Tileston v. Ullman*, 318 U.S. 44; Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599 (1962).⁸ In addition this Court has effectively used the *amicus curiae* device to eliminate the slightest possibility of failure to provide full adversary illumination.

Exercise of jurisdiction in this case is consistent with our society's legitimate expectations and this Court's increased recognition that access to the courts is an essential political activity or right. See *N.A.A.C.P. v. Button*, 371 U.S. 415,

⁸ As Judge Frankel said in dissent below:

"One such exception [to the usual rules governing standing], highly pertinent here, is the idea that where asserted violations of the First Amendment are in issue, a particular plaintiff or class of plaintiffs may be found to have standing because to deny it 'might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment — even though no special monetary injury could be shown.' *Abington School District v. Schempp*, *supra*, 374 U.S. at 266, n. 30 (Brennan J., concurring); see also, *Bantom Books, Inc. v. Sullivan*, *supra*, 372 U.S. [58] at 64-65, n. 6; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459 (1958); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)." Append. pp. 34-35 (Frankel, J., dissenting).

There has never been any suggestion in this case, nor could there be, that substantial First Amendment questions are not involved. See, e.g., *Abington School District v. Schempp*, 374 U.S. 203; *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A. 2d 51 (1966), cert. denied, app. dismissed, 385 U.S. 97.

430-31; *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S.

1. It is submitted that Professor Jaffe is correct in his view that:

"The country, I think, will want the Court to settle issues of this kind — issues which, though they do not touch the individual as immediately as would a slap on the back, in some way not easy to define are intimately related to the individual's situation and to his ethos." (74 Harv. L. Rev. at 1312).

As Senator Morse has pointed out:

"... in my judgment, we are moving into an era of our society in which I think the American people are entitled to know for a certainty that the course of action that their legislature is taking is constitutional. I think that to the maximum extent possible, without doing great damage to the judicial process from the procedural standpoint in order to carry out its major work, we ought to evolve procedures that leave no question or doubt that if there is a good faith constitutional issue raised, it will be settled by the courts." (*Judicial Review*, *supra*, Vol. 1, p. 441).

Cf. *Steward Machine Co. v. Davis*, 301 U.S. 548, where the Court in effect relaxed the *Frothingham* limitation on federal taxpayers' standing in order to affirm the constitutionality of the federal unemployment insurance program.

Finally, it is essential that the important substantive issues raised by the complaint in this case be resolved now. Not only will they never be readier for resolution, but delay in resolving them will cause great harm. American education is at the crossroads. Effective direction is hampered by constitutional uncertainties; and if the path of support from public funds for programs of religious schools is unconstitutional, the verdict should be known now before proscribed practices become so entrenched that necessary adjustments become needlessly difficult. An authoritative

answer from this Court is a *sine qua non* for the solution of one of the most vital national problems of this age — In what kind of school system will Americans be educated in the years ahead?

CONCLUSION

The recent decisions of this Court make it evident that this suit is not barred by the rule of *Frothingham v. Mellon*, 262 U.S. 447; and further, that the appellants, possessing the requisite interest or "standing to sue," have presented a "case or controversy," arising under the Establishment Clause of the First Amendment, which, in all respects is apt for judicial determination. Consequently, these *amici curiae* urge that the decision of the court below, dismissing the complaint for lack of jurisdiction, be reversed and the case remanded for trial on the merits.

Respectfully submitted,

MELVIN J. SYKES,

SANFORD JAY ROSEN,

Attorneys for Amici Curiae.

APPENDIX

*In The United States District Court
For The District of Maryland*

Civil Action No. 15756

*Lemoine Cree and Maria Cree, his wife, James W. Prescott,
Norma Shelton, Andrew F. Euston, Jr. and
Dr. Herbert F. Seversmith*

v.

*Irving Machiz, District Director of Internal Revenue
for the District of Maryland*

ORDER

(Filed August 1, 1967)

It is hereby ORDERED this 1st day of August 1967, by the United States District Court for the District of Maryland, that the motion of the defendant to dismiss the third amended complaint and to dissolve the three-judge court be and is hereby denied, without prejudice.

SIMON E. SOBELOFF,
United States Circuit Judge.

ROSZEL C. THOMSEN,
Chief Judge,
United States District Court.

R. DORSEY WATKINS,
United States District Judge.

True Copy — Test:

WILFRED W. BUTSCHKY,
Clerk.

By DOLORES A. NAGRA,
Deputy Clerk.

DATA BEARING UPON RELATIVE INTERESTS, STATE AND FEDERAL TAXPAYERS, 1922 AND 1960

Interest of Federal Taxpayers — 1922

The population of the continental United States in 1922 was 110,055,000. Historical Statistics of the United States, Colonial Times to 1957 (U.S. Dep. of Commerce, Bureau of the Census, 1960) p. 8. The 1922 volume of receipts of the federal government was \$4,109,104,000 (Id., p. 711) and the expenditures \$3,372,608,000 (Id., p. 718). The average of receipts and expenditures was approximately \$3,750,000,000 which divided by the population gives approximately a volume of flow of \$34.07 *per capita*.

Interest of State Taxpayers — 1922

According to the Department of Commerce, Bureau of the Census, Financial Statistics of the States, 1922 (United States Government Printing Office, 1924) the per capita revenue receipt and governmental cost payments for the wealthier states were as follows:

| | <i>Receipts</i> | <i>Costs</i> |
|--------------|-----------------|--------------|
| California | 16.56 | 19.71 |
| New Jersey | 14.53 | 14.67 |
| New York | 13.36 | 13.21 |
| Pennsylvania | 10.28 | 9.81 |

See Financial Statistics of the States, 1922, *supra*, Table 5.

From the foregoing, it can be seen that the per capita expenditure and income of federal governmental funds was substantially higher in respect to the population of the United States in 1922 than the per capita figure of state expenditures and income in respect to state population of the most wealthy and populous states.

Interest of Federal Taxpayers — 1960

The 1960 population of the continental United States was 178,464,236. Historical Statistics of the United States,

Colonial Times to 1957, (U.S. Dept. of Commerce, Bureau of the Census, 1960) 1962 Supplement, p. 1. The total general revenues of the government amounted to \$77,233,385,000. This works out to a per capita figure of more than \$420 per person as of 1960.

Interest of State Taxpayers — 1960

The New York state population figure for the 1960 census was 16,782,304. This was the largest population of any state that year. The 1960 budget figures for New York were \$3,303,310,000 revenue and \$3,317,205,000 expenditures Bureau of the Census, U.S. Dept. of Commerce, Compendium of State Government Finances in 1960, Table 3, Summary of Financial Aggregates by States, p. 11. (1961)

The per capita ratio works out to approximately \$190.00. The figures for the other states are comparable. Thus, New Jersey with a population of 6,066,782 had revenues of \$811,011,000 and expenditures of \$698,699,000. California, with a population of 15,717,204 had revenues of \$3,752,919,000 and expenditures of \$3,050,525,000. Pennsylvania with a population of 11,319,366 had revenues of \$2,065,941,000 and expenditures of \$2,131,883,000.

Conclusion

Thus it appears that when *Frothingham* was decided, the per capita interest of the federal citizenry in the federal treasury's activities was one and a half to three times that of the interest of the citizenry of the richest and most populous states in their own treasuries; and in 1960 the interest of the federal citizenry on a per capita basis was more than twice that of the interest of citizens of the wealthiest and most populous states. The factual assumptions of *Frothingham* were demonstrably incorrect in its day and are still incorrect. A per capita ratio in the neighborhood of much less than \$10.00 in the case of one of the less wealthy and populous states was sufficient to support a state taxpayer's suit in 1922, while a ratio in excess of \$420.00 would be insufficient to support a federal taxpayer's suit today if *Frothingham* is to be followed.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1967

FLORENCE FLAST, ET AL., APPELLANTS

v.

**JOHN W. GARDNER, as Secretary of Health,
Education, and Welfare, et al.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE
AS AMICUS CURIAE**

**FRANKLIN C. SALISBURY
1815 H Street, N. W.
Washington, D. C. 20006
Attorney for Amicus Curiae**

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 416

Florence Flast, Albert Shanker, Helen D. Henkin,
Frank Abrams, C. Irving Dwork, Florine Levin
and Helen L. Buttenwieser,
Appellants,

against

John W. Gardner, as Secretary of the Department
of Health, Education and Welfare of the United States,
and Harold Howe, 2d, as Commissioner of
Education of the United States,
Appellees.

**BRIEF OF PROTESTANTS AND OTHER
AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE AS
AMICUS CURIAE**

INTEREST OF THE AMICUS CURIAE

Protestants and Other Americans United for Separation of Church and State is a nonprofit, educational corporation organized under the laws of the District of Columbia and is a national organization of over 100,000 members interested in the preservation of civil rights arising from the constitutional principle of separation of church and state and the preservation of religious liberty as guaranteed under the religious clauses of the state and federal constitutions. "Americans United" and many of its members have suits pending in various courts seeking redress for alleged infringements

against their constitutional right as citizens and taxpayers to be free of "establishment." It is quite possible that these suits will be dismissed if this court rules that there is no "standing" in federal courts to entertain their complaints.

STATUTE INVOLVED

The statutory provisions involved in this suit are Title I and II of the Elementary and Secondary Education Act of 1965.

THE QUESTION PRESENTED

Does a plaintiff suing as a federal "citizen and taxpayer" assert "a legally cognizable injury" sustained by him when he alleges that a federal statute authorizes, or is being applied to grant, support for one or more religious establishments in contravention of the establishment and free exercise clauses of the First Amendment of the United States Constitution?

STATEMENT OF THE CASE

Certain individuals, citizens and taxpayers of the United States, and residents of the State of New York filed a complaint challenging the constitutionality, under the religious clauses of the First Amendment, of certain actions and expenditures proposed by officials of the Department of Health, Education & Welfare of the United States, acting under color of Titles I and II of the Elementary and Secondary Education Act of 1965 (20 U.S.C. §§ 241a-1, 821-27).

The complaint alleged that the actions were designed to finance the furnishing of instructional material for use in religious and church schools. The plaintiffs request a judgment declaring these expenditures to be unconstitutional and seek an injunction against further expenditures for these purposes. The plaintiffs alleged personal and grievous hurt of the type which the "establishment clause" was meant to

prevent. The plaintiffs object, on constitutional grounds, to being forced to be unwilling contributors to the support of church schools. They rely upon the "establishment" and "free exercise" clauses of the First Amendment to the United States Constitution, as interpreted by this court, to protect them from their government's participation in the establishment of any religion or church.

The District Court dismissed the complaint on the ground that following the reasoning set forth in *Frothingham v. Mellon*, 262 U.S. 447 (1923), the plaintiffs had no standing to bring the actions; that there is no justiciable controversy and that the court, therefore, lacked jurisdiction.

SUMMARY OF ARGUMENT

The court below relies on the holding in *Frothingham v. Mellon*, 262 U.S. 447 (1923), to dismiss the appellants' complaint that their constitutional right to be free of establishment under the "establishment clause" of the First Amendment would be violated by the defendant's use of government facilities to finance guidance services and instruction in reading, arithmetic and other subjects in church schools. The appellee contends that *Frothingham* is determinative of standing in the present case. Amicus argues that if it is, then it is precedent for a finding of "standing" rather than for its denial. Even under *Frothingham*, the appellants have a right to present the threatened invasion of their personal religious freedom—their right to be free of "establishment" to a federal court for redress. In *Frothingham*, an irate taxpayer acting as a volunteer "supervisor" asked a federal court to determine the constitutionality of an appropriation act providing funds for a welfare program having to do with "maternity." No personal injury or deprivation of any sort, no invasion of any constitutional right, privilege or immunity was claimed. Here the appellants complained of an infraction of their personal right to be free of "religious establishment." They did not come to the court as mere taxpayers seeking to exercise a supervisory role over the government's use of tax funds.

The appellants rely on such decisions of this court as *Hammer v. Dagenhart*, 247 U.S. 251; *United States v. Butler*, 297 U.S. 1, and *Engel v. Vitale*, 370 U.S. 421.

The appellants contend that the "establishment clause" of the First Amendment to the United States Constitution forbids the use of tax money or government resources to support any religion, and confers a right upon citizens of the United States to claim protection in the courts from a violation thereof. The violation involved in the present case is the use of federal funds under Title I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C., Sections 241a-1, 821-827 (1965) [hereinafter referred to as the "Education Act"] to provide instruction in reading, mathematics and other subjects, and guidance services and to provide textbooks, library materials and other materials in church schools.

The constitutional clause invaded is found in the Bill of Rights — the First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . ." (U.S. Constitution, Amendment 1).

The first clause of that amendment is known as the "establishment clause" and bans the use of public moneys to support any religion or all religions. The appellants rely on *Engel v. Vitale*, 370 U.S. 421 to show that the indirect coercive pressure of the defendant's action is an unconstitutional invasion of the plaintiffs' First Amendment right to be free of "establishment." This court in *Everson v. Board of Education*, 330 U.S. 1, clearly stated the parameters of the "establishment clause" and there should be no difficulty in finding that the activity complained of comes within the strictures of the "establishment clause" as so defined.

ARGUMENT

The Opinion in *Frothingham v. Mellon*, 262 U.S. 447, That a Taxpayer Lacks Standing To Question the Constitutionality of the Use of Tax Funds by the Federal Government Is Not Applicable to a Complaint Arising From an Alleged Deprivation of a Religious or Other Civil Right.

The majority opinion of the court below rests on *Frothingham v. Mellon*, 262 U.S. 447, (1923) as authority to dismiss this action for lack of "standing." On the other hand, we contend that *Frothingham* is distinguishable and actually is precedent for a finding of "standing" in this case.

Mrs. Frothingham of *Frothingham* came into the District Court as a taxpayer of the United States and:

✓ "... her contention, though not clear, seems to be that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law," (p. 486)

The court held:

"We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. *That question may be considered when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.*" (p. 488) (emphasis supplied)

Mrs. Frothingham as an irate taxpayer acting as a "supervisor", asked the federal court to determine the unconstitutionality of an appropriation act providing funds for a welfare program having to do with "maternity." No personal injury or deprivation of any sort, no invasion of any constitutional right, privilege, or immunity was claimed by or on behalf of Mrs. Frothingham.

Further, a reading of the briefs filed in *Frothingham v. Mellon* reveals that the litigants did not consider the possibility of loss of access to the courts because of "standing"

to be a major problem in the case. There was no thorough presentation by counsel of the legal background upon which to base a finding of a lack of "standing." This court indicated that the matter was one of first impression.

Justice Douglas has subsequently indicated that he has experienced great difficulty with *Frothingham*. In *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962), Justice Douglas, concurring, stated:

"That case held that a taxpayer of the United States had no standing to challenge a federal appropriation, since the question was essentially a matter of public not private concern. . . this ruling was projected into the state field by the *Doremus* case, barring relief to those legitimately concerned with the operation of the public school system." (114-115)

Justice Douglas favorably quotes Edmond Cohn's "How To Destroy the Churches" (Harper's Magazine, November, 1961, p. 36):

"Rulings of this kind, designed to keep peace among the departments of the government, are eminently sensible as over-all policies. Yet they also provide a way to immunize a bad law from attack in the courts: one need only frame the law in such a way as to violate the basic rights of nobody in particular but everybody in general, that is, of the *entire* American people. Then, since no one can point to an injury that is distinguished from his neighbors', no one can come into court and challenge the legislation." (369 U.S. at 116 (N).)

However, the court need not reevaluate *Frothingham*, but merely distinguish it from the case at bar and confine it to the type of litigation brought by Mrs. Frothingham — a taxpayer's complaint of a supervisory nature.

We only ask this court to distinguish the present factual situation from that in a taxpayer's suit which is supervisory in nature as in *Frothingham* where the taxpayer objected to an action which harmed all taxpayers because it represented a misuse of tax funds. The doctrine enumerated in

Frothingham should be limited to cases where the taxpayer does not rest his claim for standing on the infringement of a personal constitutional right as in this case where a religious civil right guaranteed by the First Amendment to the United States Constitution is alleged to be invaded.

This court has long made such a distinction without pointing it out in so many words. For example, in *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529 (1918), the father of two minor sons was able in the United States District Court for the Western Division of North Carolina to test the constitutionality of a federal statute designed to prevent interstate commerce in the products of child labor. The District Court held the law unconstitutional. On appeal to this court, Mr. Justice Day allowed plaintiffs access to the court. Perhaps this was because, as in the case at bar, there was involved a question of a possible infringement of a "right" of the plaintiff. While granting that the decision on the merits would not represent the law today, nevertheless, the case is precedent for this court to permit "standing" in a case where a civil right is claimed to be invaded. In *Hammer v. Dagenhart*, the plaintiff's children's privilege to work was jeopardized by an act of Congress. The enforcement of the act would have deprived children of a certain age of their alleged right to work — a right which they shared with all other children similarly situated. The court heard their cause.

In another important case *United States v. Butler*, 297 U.S. 1 (1935), the defendants relied upon *Frothingham*, but this court had no difficulty distinguishing the case:

"*Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.ed. 1078, is claimed to foreclose litigation by the respondents or other taxpayers, as such, looking to restraint of the expenditure of government funds. That case might be an authority in the petitioners' favor if we were here concerned merely with a suit by a taxpayer to restrain the expenditure of the public moneys. It was held that a taxpayer of the United States may not question ex-

penditures from its treasury on the ground that the alleged unlawful diversion will deplete the public funds and this increase the burden of future taxation." (p. 57-58)

In the present case, appellants seek redress for a personal grievance, the use of public funds, resources and personnel in a way which clearly aids the establishment of religion, with a threat of spiritual and physical injury to themselves, if the "establishment" takes place. Any action on the part of persons in the employ of the federal or state governments to use the government resources at their command to establish any religion poses a threat to the appellants' present peace of mind and eventual safety contrary to the guarantee of the Bill of Rights.

There are other cases which can be cited as precedent for limiting *Frothingham* to situations where the plaintiff as a taxpayer exercises a "supervisory" role rather than is a victim of some invasion of his civil rights. In *Engel v. Vitale*, 370 U.S. 421 (1962), the parents of ten public school pupils brought an action in a New York State court insisting that the required use of an officially composed prayer in the public schools violated both the "establishment" and "free exercise" clauses of the First Amendment. This Court did not struggle with the question of standing, but proceeded to find the statute in question unconstitutional on "establishment" grounds.

In *Vitale* and later *School District of Abington v. Schempp*, 374 U.S. 203 (1963) there is recognized a constitutional right not to have one's children exposed to religious indoctrination at the hands of the state. When the government furnishes funds to assist in the educational process of church schools, it assists in the work of churches to indoctrinate children in their particular faith. This court in *Schempp* not only found that the required reading of the Bible in a public school as part of a religious exercise is designed to establish religion and is therefore unconstitutional, but acknowledged that one has a right not to be indoctrinated by the state with any

religion in violation of one's constitutional right to "free exercise." Hence, it seems clear that any governmental aid to religious indoctrination in public or church schools gives a person who is personally offended thereby a right to bring an action in the federal courts to stop the practice before there develops an "establishment" of religion presenting a clear menace and threat to one's religious liberty. This, regardless of whether the person is a taxpayer or not.

Reliance is placed by many who would defeat the jurisdiction of the federal courts in religious rights cases on *Doremus v. Board of Education*, 342 U.S. 429 (1952). In that case, Mr. Justice Jackson pointed out that the Supreme Court of New Jersey had found:

"No one is before us asserting that his religious practices have been interfered with or that his right to worship in accordance with the dictates of his conscience has been suppressed. No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below. One of the plaintiffs is 'a citizen and taxpayer'; the only interest he asserts is just that. . ." (p. 431) (emphasis supplied)

The majority opinion of the court below disregards the distinction of the factual situation between this case and *Doremus*.

"Moreover, plaintiffs' attempt to distinguish *Frothingham* on the grounds that the instant litigation involves rights protected by the First Amendment must be rejected in light of the Supreme Court's decision in *Doremus v. Board of Education*, 342 U.S. 429 (1952)."

But *Doremus* did not involve persons asserting an invasion of their religious rights under the United States Constitution. *Doremus* was a taxpayer's action without any showing of financial injury. On the contrary, the plaintiffs here "allege the vividly personal, vital, and grave hurt against which the Establishment Clause was meant to guard." We do not argue with *Doremus* that if a taxpayer bases his

complaint *solely* on the idea that the use of his taxes is illegal that he must show the invasion of a direct financial interest. But here, the appellants have pleaded "the requisite special injury. They have contended that the deprivation of their civil right to be free of "establishment" with its consequent physical and mental damage is a special injury. The claimed injuries here are "precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." *McCullum v. Board of Education*, 333 U.S. 203 at 228 (1948) (Frankfurter J. concurring).

Chester Antieau, *Commentaries on the Constitution of the United States*, 219, 220 (1960) points out that a test of reasonableness which might be acceptable for legislation dealing with public welfare and economic policy such as was involved in *Frothingham*, is inapplicable to matters of religious liberty because such a test

"is gross error for it puts freedom of religion and communication on the same level as the 'right' to run a sweatshop and utterly disregards the fact that the Founding Fathers deliberately enshrined this particular right in the Constitution to permanently indicate its place in our hierarchy of socio-legal values."

Mr. Justice Stone likewise in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1958) contrasted the favored position of those seeking protection for religious liberty compared to a mere economic matter. He stated:

"(R)egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis with the knowledge and experience of the legislators. (4)

(Note 4)

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth." See *Stromberg v. California*, 283 U.S. 359, 369-70; *Lovell v. Griffin*, 303 U.S. 444.

We contend that the opinion of the court below leaves the appellants without a judicial remedy for the abuse of one of the most important civil rights guaranteed by the First Amendment to the United States Constitution. It is the right to be free of religious establishment and to exercise one's own religion, or enjoy one's lack of religion, free of coerced financial support of any religion.

There can be no doubt that this court has repeatedly ruled that no state nor the federal government may use taxpayers' funds to aid religious institutions in their good works. The Supreme Court of the United States has made this clear, case by case, to cite but a few.

"Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person." *Zorach v. Clauson*, 343 U.S. 306 at 314.

"When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421 at 431.

The Elementary and Secondary Education Act of 1965 has resulted in the channeling of federal funds into schools of the various churches. To be sure, this has been done by circuitous means and under the guise of "aiding the child," but the end effect has been that of public assistance to church institutions. The controversies over the administra-

tion of such aid that have broken out in virtually every state point up the serious difficulties which continuance of this unconstitutional program will bring.

The one sure way to establish religion is to finance it. The "Education Act" results in the financing of religion's most essential ministry, its program of indoctrination of the young. What results can we expect from such a program? In 1918, Holland amended its constitution and provided for the distribution of the state's funds to religious schools. Holland had at that time a great system of common schools in which most of the children were educated. In the half century since, that system has been decimated and its decline continues. Today only one-fourth of the children at the elementary level, and one-third at the secondary level are educated in the public schools of that country. The confessional schools, Protestant and Roman Catholic, have taken over.

The deep cultural fissures for which Holland is noted are attributed by sociologists and historians to the division of the children in the schools. In Holland, television and radio are divided on a sectarian basis — Protestant and Catholic. The political parties are organized by religion — Protestant and Catholic. Labor unions, manufacturers' associations and farmers' groups are similarly organized — by religion. Hiring practices are rigid — Catholic hires Catholic; Protestant hires Protestant. The sectarian divisions are dug deep into the face of Holland and it is the schools that have dug them in. The children divide by religion when they go to school and they continue the division the rest of their life, in everything they do. The framers of the "Bill of Rights" protected us to the best of their ability against such divisiveness.

Thus far, we have moved only part way into such a program of sectarian subsidy here in this country. But it has been enough to indicate a trend. The so-called "Christian Day Schools" have been greatly expanded in the past two years. Many sects have given indication that they are ready

to take advantage of proffered federal funds to set up private institutions. The desire to escape racial integration in the public schools provides another incentive. In this melange of schools, all supported by tax funds the concept of public schools, of, by, and for all the people, will be diluted imminently and dissolved ultimately.

The Education Act has had a shattering effect upon local controls and practices in education. With the legislation's announced purpose of circumventing or overriding state provisions in regard to the separation of church and state, the severest kind of damage is already evident. For under this legislation what state law forbids, the federal agency insists upon as the price of drawing the funds at all. At one time in our history certain states developed a doctrine of nullification by which they sought to be rid of federal requirements which they resented. Today we have nullification in reverse. We have the federal government nullifying state provisions and state controls with which it professes to disagree. In the process it is also destroying our entire tradition of the local control and management of education.

The constitutional principle of separation of church and state is a sure casualty of this kind of law. What separation is there when the federal government, under whatever pretext, is pouring its funds into church institutions? All the ills which a union or partial union of state and church have traditionally created are in the making here. The sects compete for the tax dollar. The government must face the anger of people who resent nothing more than being taxed for religion. Churches and clergy show a steadily declining status in the estimate of the people. The spiritual effectiveness of a church declines as its government subsidy rises.

The appellants have a right set forth in the Bill of Rights in the Federal Constitution not to be coerced into financing the destruction of the public school system, into financing religious divisiveness, and those appellants who are adherents of minority faiths into financing their own probable

eventual persecution. And with this right goes the privilege of its defense in the federal courts by any person whose religious beliefs would put him in jeopardy if state establishment of a religion other than his own were consequent to the unconstitutional actions.

Finally, let us add that the principle of separation of church and state embodied in the First Amendment and in the learned opinions of this court is still cherished by the plain people of this nation. On November 7, 1967, the citizens of New York voted by an almost three to one majority to reject a new state constitution which omitted the stipulation which is in the present New York Constitution that no tax funds can be spent, directly or indirectly, for schools under sectarian control, or in which any denominational tenet or doctrine is taught. Not one of the state's sixty-two counties, not one of New York City's five boroughs, voted to accept the new charter. This, in spite of the fact that the full resources and political power of the Roman Catholic Church were marshalled behind the proposed new Constitution. Millions of dollars were spent in advertising and backing the new charter. A manifesto urging a "YES" vote on the new charter was read in every Catholic Church in the Archdiocese of New York. This, in spite of the fact that the powerful AFL-CIO leadership backed the proposed new constitution. This, in spite of the fact that a constitutional convention had spent six months and millions of dollars formulating the new charter.

It foundered on one rock: It was rejected by persons of all faiths because of its failure to protect the citizens of New York against the use of tax money for church schools. It took the votes of thousands of Catholic believers to keep the prohibition against the use of government funds generated by the taxpayers of New York for aid to churches from being eliminated. To preserve this principle so highly held by the framers of our constitution that it was made a personal right under the First Amendment, and is found similarly in the constitutions of the vast majority of the states,

this court should reaffirm the right of citizens to seek redress in the federal courts for violations of their right to be free of establishment and to enjoy religious freedom.

CONCLUSION

For the reason stated, it is respectfully submitted that the order of the United States District Court for the Southern District of New York should be reversed and the case returned to the lower court for reconsideration on the merits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Appellees.

**BRIEF OF THE NATIONAL COUNCIL OF
CHURCHES, AMICUS CURIAE**

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Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Appellees.

**BRIEF OF THE NATIONAL COUNCIL OF
CHURCHES, AMICUS CURIAE**

Interest of the *Amicus Curiae*

The National Council of the Churches of Christ in the United States of America is a membership corporation incorporated in 1950 under the Membership Corporations Law of the State of New York. It is the co-operative agency of thirty-four Protestant and Orthodox religious denominations with an aggregate membership of approxi-

mately 42,500,000 throughout the United States. Its government is by a representative General Board whose 255 members are selected by the constituent communions according to their respective procedures.

The corporate purposes of the National Council of Churches, as stated in its certificate of incorporation, are to act as:

“an inclusive co-operative agency of Christian churches in the United States of America; to bring churches into further united service for Christ and the world; to strengthen the spirit of fellowship, service, and co-operation among them; to promote the application of the law of Christ in every relation of life; and to encourage and further the achievement of such purposes in local communities and throughout the world. It shall operate non-profit for these charitable, benevolent and religious purposes. * * *”

The National Council has always stood firmly for the principle of the independence of church and state, as affirmed by this Court in *Abington School Dist. v. Schempp*, 374 U. S. 203, 216:

“There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. * * * This freedom was first in the Bill of Rights because it was first in the forefathers' minds; * * *

The National Council believes that those who are the possessors and intended beneficiaries of these essential freedoms have and should have, in their own interest and

in the interest of the freedoms themselves, the right to seek judicial protection when the government imposes an obligation to pay taxes to be used directly or indirectly for schools educationally affiliated with religious tenets or when government appropriates public moneys for such schools.

As an agency of Christian churches in the United States, the National Council has a direct interest in this problem because history has made clear that when government provides direct support to religious institutions both the religious institutions themselves and the personal liberties of their members invariably suffer. The National Council thus shares with this Court the belief that:

“[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.” *McCullum v. Board of Education*, 333 U.S. 203, 212.

The National Council of Churches also has a distinctive interest as an organization which supported the Elementary and Secondary Education Act, and continues to support it, in the belief that its provisions as outlined in the legislative history are not contrary to the Constitution as interpreted by this Court. (The National Council considers, however, that the implementation of the Act in some places has been inconsistent with the First Amendment.) As a friend of the Act, as well as of the Court, the National Council is uniquely qualified to urge that those who challenge the constitutionality of the Act's administration should be given their day in court to argue their claims on the merits.

The Questions for Review

Was the majority of the court below correct in ruling that plaintiffs have no standing to bring this action, and hence that the court lacks jurisdiction of the subject matter?

Was the majority of the court below correct in ruling that *Frothingham v. Mellon*, 262 U.S. 447, requires or permits dismissal of this action?

The Facts

The facts are not in dispute.

Since the complaint was dismissed "for lack of jurisdiction of the subject matter", the truth of its factual allegations must be assumed.

These allegations are that in administering Titles I and II of the Elementary and Secondary Education Act of 1965 (20 U.S.C. §§241a-241l, 812-827; Supp. I, 1965), the defendant federal officials are using funds raised by federal taxation to finance in religiously operated schools guidance services, instruction in reading, arithmetic and other subjects, and to enable such schools to obtain text books and other instructional materials. Thereby the government enhances the curriculum and facilities of schools operated by religious groups and releases funds of the managing religious groups for religious purposes.

The plaintiffs are individual citizens and qualified voters of the United States and of the State of New York. All

are federal taxpayers. One is a real property taxpayer in New York. One has children who attended the elementary and secondary grades of the New York City public schools.

The plaintiffs ask judicial determination that these uses of public funds and taxation to secure them are not authorized by the Act and are violative of the constitutional rights, privileges and immunities of the plaintiffs as citizens, voters, property owners and federal taxpayers, and that the federal government has no constitutional power to impose upon them tax obligations to supply funds usable for such purposes.

Title 20, §§821 et seq. of U.S.C., constituting Chapter 24, "Education", is entitled:

"Grants for educational materials, facilities and services, and strengthening of educational agencies."

Subchapter I is entitled:

"School library resources, textbooks, and other instructional materials."

As first enacted §821 carried an appropriation of \$100,000,000 for the foregoing for the use of children and teachers "in public and private elementary and secondary schools" for the fiscal year ending June 30, 1966. Subsequent legislation increased the appropriation to \$125,000,000 for 1967 and \$150,000,000 for 1968.

Plaintiffs requested that a three-judge court be convened pursuant to 28 U.S.C. §§2282, 2284, to consider their contention that moneys appropriated under these statutes are being utilized in ways which violate the Establishment

and Free Exercise Clauses of the First Amendment. Defendants opposed the application for the convening of a three-judge court and moved to dismiss the complaint on the ground that plaintiffs lack standing to sue. The application for a three-judge court was granted. See *Flast v. Gardner*, 267 F. Supp. 351.

Before the three-judge court the defendants moved to dismiss the complaint. The court held (2-1) that plaintiffs had no standing to bring this action, that thus there was no justiciable controversy, and the court therefore lacked jurisdiction of the subject matter. Judge Frankel dissented. The opinions of the court below are reported at 271 F. Supp. 1.

POINT ONE

Plaintiffs, as citizens and as taxpayers, have standing to challenge federal appropriations alleged to constitute an encroachment upon the rights, liberties, and equality of the individual protected by the Establishment and Free Exercise Clauses of the First Amendment.

This appeal presents a basic problem of individual religious freedom. While the complaint challenges expenditure of money, money itself is not the ultimate issue. The Free Exercise and Establishment Clauses are coordinate restrictions on governmental powers, both designed with the purpose of protecting the citizen's freedom of conscience and belief. The Establishment Clause is, among other things, the embodiment of the Framers' recognition that one of the most important means of protecting individual religious liberty is to strip the government "of all power to tax, to support, or otherwise assist any or all religions." *Everson v. Board of Education*, 330 U. S. 1, 11. See also *Torcase v. Watkins*, 367 U. S. 488, 492-93; *McGowan v. Maryland*, 366 U. S. 420, 442-43.

There is abundant history that support of religion by taxation was a principal evil at which the Establishment Clause was aimed.¹ Virginia was the proving ground in this respect for the entire Bill of Rights. There James Madison, through his Memorial and Remonstrance of 1785, led the resistance to a proposed tax for the payment of

1. The full historical record is amply reviewed in *Everson v. Board of Education*, 330 U.S. 1, both in the opinion of the Court and in the dissenting opinion of Justice Rutledge.

salaries of teachers of religion. He argued that no government should have the power to force a citizen to contribute "three pence only of his property for the support of any one establishment." Para. 3.

The Preamble of the Virginia Bill for Religious Liberty, authored by Madison and Thomas Jefferson, states the underlying principle: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Commager, *Documents of American History*, p. 125 (1944). After the essential issues were settled in Virginia, there was little dissent in Congress from the proposition that the government should be utterly prohibited from using public funds to support religion. "[T]he provisions of the First Amendment * * * had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Id.* at 13.

The deep concern by the Framers of the Constitution over "support" was rooted in their fear of governmental coercion. This coercion takes two distinct forms—individuals are forced to expend their funds to support one or more religions, and, more subtly, they are also subjected to pressures to conform to prevailing attitudes. The existence of the first type of coercion is self-evident whenever a taxpayer is required to pay for a nominally secular program undertaken and controlled by a religious institution not responsible to public authority. With respect to the second, this Court stated in *Engel v. Vitale*, 370 U.S. 421, 431:

“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”

That the majority below failed to take into account this second type of coercion is made clear by its statement that

“If appellants established the requisite special injury necessary to a taxpayer’s case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here.” 271 F. Supp. at 3, quoting *Doremus v. Board of Education*, 342 U. S. 429, 434-35.

We maintain that this basis for the dismissal of the action is fundamentally erroneous because it does not recognize that the rights advanced here are not primarily monetary in nature. The substance of the Bill of Rights is freedom, not money, and the dominant inducement for this action is the protection of individual and social freedom, which the Constitution requires the national and state governments to respect.

To deny the citizen access to the courts for the protection of the rights so solemnly reserved to him by the Constitution unless he can show major financial damage is, we submit, to degrade the Bill of Rights from a declaration of fundamental liberties to a mere declaration of monetary rights, or to rhetorical abstractions.

Freedom of conscience is justiciable, no less than the freedoms of speech and press, not because of monetary evaluation but because of its intrinsic value—a value beyond mere money and the pocketbook. In *Sherbert v. Verner*, 374 U.S. 398, 412, Justice Douglas in concurring put as follows the principle which we believe determinative of this appeal:

“The result turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual’s scruples or conscience—an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not in measurable damages.” (Emphasis added.)

An essential part of a citizen’s right to freedom of religious belief is the right not to have his conscientious views disadvantaged by government action and use of funds. In *Everson v. Board of Education*, *supra*, 330 U. S. at 18, this Court emphasized that the Bill of Rights “requires the state to be a neutral in its relations with groups of religious believers and non-believers.” When the government advantages with public money particular religions, either directly or indirectly by freeing private moneys for the purpose of religious education, it impairs the freedom of those who possess different or contrary tenets. That is, to the extent that the government directly or indirectly supports religiously affiliated schools it ceases to be “neutral” among its citizens in the field of religion, and it “disparages” and disadvantages those whose religious or non-

religious beliefs and practices do not include the establishment of private schools and those who belong to groups and sects whose numbers are few. 'See Madison, Memorial and Remonstrance, Para. 9.

And, as the Framers were well aware, the lack of neutrality inherent in government financial support of religion has historically been the forerunner of the more extreme coercion of religious persecution.

This Court has recognized the governing principle in the analogous constitutional area of legislative reapportionment. In *Baker v. Carr*, 369 U. S. 186, 207-08, it is stated:

"The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties."

So here. The plaintiffs are placed by the Government in a position of constitutionally unjustified inequality *vis-a-vis* those religious groups whose activities are favored with public funds. This abrogation of the plaintiffs' *personal* rights invades the heart of the protections accorded by the First Amendment. See *Girouard v. United States*, 328 U. S. 61, 68; *Schneider v. State*, 308 U. S. 147, 161.

Furthermore, we submit that the rights the plaintiffs seek to vindicate are fundamental personal rights guaranteed by the Ninth Amendment. Religious activity, as much as the marital relation, is a "particularly important and

sensitive area of privacy." *Griswold v. Connecticut*, 381 U. S. 479, 495 (Goldberg, J. concurring).²

That these constitutional values are entitled to full respect is evident because the Framers and this Court have frequently emphasized that the "slightest breach in the wall between church and state" must be vigorously resisted." *Everson v. Board of Education*, *supra*, 330 U. S. at 18; that it is essential to, "take alarm at the first experiment on our liberties * * * [and] not wait until usurped power [has] strengthened itself by exercise, and entangled the question in precedents," Madison, Memorial and Remonstrance of 1785, Para. 3; and that "relatively minor encroachments on the First Amendment" must be checked or "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *Abington School Dist. v. Schempp*, *supra*, 374 U. S. at 225.

The important policies which the First Amendment was designed to foster will be seriously threatened if the decision below is affirmed. As Judge Frankel noted below, the Government has acknowledged that "its arguments opposing plaintiffs' standing would be no different if the case involved federal appropriations to build churches for particular sects—i.e., presumably clear violations of the First Amendment's ban * * *." 271 F. Supp. at 5. In other words, just as the "same authority which can force a citizen to contribute three pence * * * for the support of any one establishment may force him to conform to any other establishment in all cases whatever," Madison, Memorial

2. See also *Rosenblatt v. Baer*, 383 U.S. 75, 92 (Stewart, J., concurring); *Abrams, What Are the Rights Guaranteed by the Ninth Amendment?*, 53 A.B.A.J. 1033 (1967).

and Remonstrance, Para. 3, so the principle which would deny judicial review here would also preclude judicial review of the most egregious cases of constitutional violation.³

This drastic consequence is plainly inadmissible under our constitutional scheme because the plaintiffs here meet the established criteria by which this Court has determined questions of standing in the past.

Justice Brennan has twice emphasized in leading cases that "the concept of standing is a necessarily flexible one, designed principally to ensure that the plaintiffs have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. * * *'" *Abington School Dist. v. Schempp, supra*, 374 U. S. at 267 n. 30, quoting from *Baker v. Carr, supra*, 369 U. S. at 204.

This standard is easily met in the instant case. We have already shown, in light of the purposes of the Bill of Rights, that appellants have a vital "personal stake" in the outcome of this litigation. Secondly, as Judge Frankel remarked below, "There has not been any suggestion that the suit is not genuine, robustly adverse, and likely to be fought on the kind of sharp and thorough presentation the courts must have for problems of such moment." 271 F. Supp. at 12 n. 11. Accordingly, plaintiffs are properly before this Court "as representatives of the public interest." *Scripps-Howard Radio v. FCC*, 316 U. S. 4, 14;

3. The doctrine *de minimis non curat lex* has been recognized by this Court as having no application to the Bill of Rights. See *Engel v. Vitale, supra*, 370 U.S. at 436, quoting the Memorial and Remonstrance.

see also *Associated Industries v. Ickes*, 134 F. 2d 694, 704 (2d Cir.), *vacated and remanded*, 320 U. S. 707 ("private Attorney Generals" may challenge official action).

In this light, it is important that there are no other prospective parties who have better, or indeed as good, standing to sue as the plaintiffs here. Although it is not the law that someone always must have standing to challenge legislation, a particular plaintiff or class of plaintiffs may be found to have standing because to deny it "might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment—even though no special monetary injury could be shown." *Abington School Dist. v. Schempp*, *supra*, 374 U. S. at 266 n. 30 (Brennan, J., concurring). Thus, this Court should be slow to deny standing to the plaintiffs in this case because such a ruling would immunize from review even the most flagrant violations of the Constitution—such as government appropriations to pay for church buildings or the salaries of ministers.⁴

The constitutional premise which underlines this analysis was stated by Justice Robert Jackson: "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the

4. The Court has applied this principle in analogous contexts, recognizing that protection of the "delicate and vulnerable, as well as supremely precious" rights of the First Amendment, *NAACP v. Button*, 371 U. S. 415, 433, may require exceptions "to the usual rules governing standing * * *." *Dombrowski v. Pfister*, 380 U. S. 479, 486; *NAACP v. Alabama*, 357 U. S. 449, 459; cf. *Barrows v. Jackson*, 346 U. S. 249.

courts." *West Virginia State Bd. of Education v. Barnette*, 319 U. S. 624, 638. This formulation is consistent with Madison's recognition that the validity of appropriations for religion could not be left to legislative judgment: "The preservation of a free government requires not merely, that the metes and bounds which separate each department may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people." Madison, Memorial and Remonstrance, Para. 2.

Judicial review is the constitutional method of preserving "the great Barrier" which protects the rights of the people. Accordingly, if the plaintiffs here are denied standing, the power of Congress to make appropriations for religion is effectively unlimited, and "the Legislature * * * may sweep away all our fundamental rights." Madison, Memorial and Remonstrance, Para. 15.

POINT TWO

***Frothingham v. Mellon*, 262 U. S. 447, neither requires nor justifies denial of standing to plaintiffs.**

The sharp difference between *Frothingham* and this case, as suggested just last term by Mr. Justice Harlan, is that the plaintiffs here are not claiming that a possible financial loss is "by itself" a sufficient interest to sustain a judicial challenge to governmental action. *Abbott Laboratories v. Gardner*, 387 U. S. 136, 153. They are not asserting, as was Mrs. Frothingham, a roving commission to challenge federal appropriations. Instead, they invoke

the weighty interests sought to be protected by the First Amendment, all of which flow from their claim that public moneys are being used under the Education Act to support religious schools.

In *Everson v. Board of Education*, *supra*, the Court implicitly recognized that the plaintiffs have a justiciable interest by accepting without discussion the right of a local taxpayer to challenge school busing expenditures under the First Amendment. The only possible distinction between *Everson* and this case is the statement in *Frothingham* that "the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury * * * is shared with millions of others; [it] is comparatively minute and indeterminable." *Frothingham v. Mellon*, *supra*, 262 U. S. at 487. But this distinction is spurious. As distinguished commentators have pointed out, whatever validity it might have had in 1923, it no longer makes sense now when federal expenditures exceed one hundred billion dollars a year and some taxpayers pay millions of dollars a year.⁵

If the standing of a federal taxpayer is less than that of a state taxpayer, the anomaly will arise of the Bill of Rights being judicially enforceable in "support" cases against the States but not against the federal government. Not only would this be ironic in view of the First Amendment's primary purpose to serve as a bulwark against the central government, but it would result in a different version of the

5. Davis, *Standing to Challenge Government Action*, 39 Minn. L. Rev. 353, 387 (1955); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1312 (1961); Wright, *Federal Courts* 37 (1963).

First Amendment being applicable to the federal government than to the States.

In *Frothingham*, the Court also expressed the fear that a different result would allow every taxpayer to bring suit to enjoin every federal expenditure: "The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion we have reached, that a suit of this character cannot be maintained." *Frothingham v. Mellon*, *supra*, 262 U.S. at 487.

This argument has no merit. In the first place, the present case arises under the Bill of Rights, and a decision by the Court here could have application only to similar actions.

Secondly, with respect to each challenge to legislation, only one suit would be necessary to determine the constitutionality of an expenditure. As stated by Judge Frankel below, "*Stare decisis*—and, before that, the powers of the lower courts to stay or consolidate redundant actions—will dispose of the matter with only the customary strain of adjudication for which courts sit." 271 U.S. at 17. For 20 years this Court has had appellate jurisdiction under *Everson* of the much larger number of anti-support actions that can be brought by municipal and state taxpayers, and there have been no signs of the "inconveniences" predicted in *Frothingham*.

Thirdly, in view of the fact that nearly all states permit actions by municipal taxpayers and a steadily increasing number of them (presently at least 34) allow actions by state taxpayers, see Note, Taxpayers' Suits: A Survey

and Summary, 69 Yale L. J. 895, 901-02 (1960), experience confirms that the courts will not be flooded.

The Court in *Frothingham* also evinced concern with the related problem of the separation of powers. "The functions of government under our system are apportioned. * * * The general rule is that neither department may invade the province of the other. * * * We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional." *Frothingham v. Mellon, supra*, 262 U. S. at 488.

But the special nature of the First Amendment distinguishes this case from *Frothingham*. The Framers included the Establishment Clause because they believed that government support of religious institutions would threaten individual freedom. The Clause thus embodies the conviction, directly relevant to the question of judicial review, that the individual is significantly affected by government spending in the area of religion even though he may not be so affected by spending in other areas.⁶

This special feature of the Establishment Clause is intimately linked to the "preferred position" of First Amendment rights and the corresponding practice of this

6. It has been argued that this Court's decision in *Doremus v. Board of Education*, 342 U.S. 429, shows that *Frothingham* applies in Establishment cases. But the *Doremus* case differed critically from the present one in that there was no allegation of specific expenditures in support of religion. The gist of the complaint was rather that Bible reading was required in public schools. This prompted the Court to conclude that the suit was not "a good faith pocketbook action." *Doremus v. Board of Education, supra*, 342 U.S. at 434. Obviously, *Doremus* can have no bearing here, where the appropriations of public funds run into hundreds of millions of dollars and are specifically for "library resources, textbooks and other printed and published instructional materials for the use of children and teachers in public or private elementary and secondary schools."

Court to scrutinize with particular care legislative action which threatens to impinge on such rights. See, e.g., *Thomas v. Collins*, 323 U.S. 516, 529-30; *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4. In this light it is plainly not an intrusion into the sphere of Congress for the courts to entertain suits brought to vindicate the rights asserted here.⁷

Conclusion

For the above reasons, the decision of the court below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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7. There is a further reason why reversal of the decision below will not involve this Court in forbidden areas. The policy of separation of powers, which is at the root of the concern expressed in *Frothingham*, is also guarded by the political question doctrine. Over two-thirds of federal expenditures are for defense and foreign affairs, areas in which the Constitution gives authority to the political branches. Even if the political question doctrine did not apply, taxpayers would have no substantial grounds on which to attack federal expenditures. If taxpayers attempted to challenge federal programs, as Mrs. Frothingham did in 1923, it would be unavailing since decisions of this Court have made it clear that Congress may spend for the general welfare. *Helvering v. Davis*, 301 U. S. 619; *Steward Machine Co. v. Davis*, 301 U. S. 548; *United States v. Butler*, 297 U. S. 1.

LIBRARY
SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

JOHN F. DAVIS, CLERK

October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF AMICI CURIAE

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IN THE
Supreme Court of the United States

October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

BRIEF OF AMICI CURIAE

This brief is submitted, by consent of the parties, in
behalf of the following national Jewish organizations:

American Jewish Committee
American Jewish Congress
B'nai Brith Anti-Defamation League
Central Conference of American Rabbis

Jewish War Veterans of the U.S.A.
 National Council of Jewish Women
 Rabbinical Assembly
 Rabbinical Council of America
 Union of American Hebrew Congregations
 United Synagogue of America

and the following local Jewish Community Councils:

Albany Jewish Community Council
 Atlanta Jewish Community Council
 Baltimore Jewish Council
 Jewish Community Council of Metropolitan Boston
 Community Relations Council of Camden County, N.J.
 Jewish Community Federation, Canton, Ohio
 Cincinnati Jewish Community Relations Committee
 Connecticut Jewish Community Relations Council
 Jewish Community Council of Dayton
 Jewish Community Council of Metropolitan Detroit
 Jewish Community Council of Easton and Vicinity
 Jewish Community Welfare Council, Erie, Pa.
 Jewish Community Council of Essex County, New
 Jersey
 Jewish Community Council of Flint, Mich.
 Community Relations Committee of the Hartford
 (Conn.) Jewish Federation
 Indiana Jewish Community Relations Council
 Indianapolis Jewish Community Relations Council
 Community Relations Committee of the Jewish-
 Federation Council of Greater Los Angeles
 Milwaukee Jewish Council
 Jewish Community Relations Council of Minnesota
 New Haven Jewish Community Council
 Norfolk Jewish Community Council
 Jewish Community Relations Council for Alameda
 and Contra Costa Counties, Oakland, Calif.
 Jewish Community Council of Paterson, N. J.
 Jewish Community Relations Council of Greater
 Philadelphia

Jewish Community Relations Council, Pittsburgh
 Jewish Community Council of St. Joseph County, Ind.
 Jewish Community Relations Council of St. Louis
 San Francisco Jewish Community Relations Council
 Savannah Jewish Council
 Community Relations Committee of the Jewish
 Community Council of Schenectady
 Jewish Community Council of Springfield, Mass.
 Syracuse Jewish Welfare Federation
 Community Relations Committee of the Jewish
 Welfare Federation of Toledo
 Jewish Community Council of Greater Washington
 Jewish Federation of Waterbury
 Community Relations Council of the Jewish
 Federation of Youngstown, Ohio

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guaranty of religious liberty and has proved of inestimable value both to religion and to the community generally. Inasmuch as our brief is not addressed to the substantive issues in the litigation described below, it is essential to note that being a signatory to this brief is not to be construed as indicating support for the position of the plaintiffs in such litigation; the signatories are merely associating themselves in this brief with the position that judicial review is justified in this case.

Statement

This is a suit by a group of citizens and taxpayers of the United States against the Secretary of the Department of Health, Education and Welfare and the Commissioner of Education of the United States. It seeks to prevent the expenditure of Federal funds in a manner which, the plaintiffs contend, violates the religion clauses of the First Amendment to the United States Constitution. Specifically, the plaintiffs challenge these expenditures under the Elementary and Secondary Education Act of 1965, Public Law 89-10, 64 Stat. 1100, 20 U.S.C. secs. 241a-1, 821-27 (Supp. I, 1965), which benefit schools operated by sectarian institutions. These expenditures include the financing in whole or in part of instruction in reading, arithmetic and other subjects and for guidance in sectarian schools under Title I of the Act and the financing of the purchase of textbooks and instructional and library materials for use in such schools under Title II of the Act.

The defendant government officials moved to dismiss the complaint on the ground that plaintiffs do not have standing to bring this action. A special three-judge District Court, duly convened, sustained that motion by a vote of two to one. The case is now here on appeal, this Court having noted probable jurisdiction on October 16.

Question to Which this Brief is Addressed

Do citizens of the United States who pay taxes to the United States Government have standing to bring a suit in a Federal court to enjoin expenditures of Federal money in aid of sectarian schools, contrary to the provisions in the First Amendment to the United States Constitution, particularly those guaranteeing freedom of religion and prohibiting a religious establishment?

ARGUMENT

American citizens who pay taxes to the United States Government have standing to initiate action in the Federal courts challenging the use of Federal funds in aid of sectarian schools contrary to the clauses on religion in the First Amendment to the United States Constitution.

A. This Proceeding Raises an Important Constitutional Issue that Should be Resolved.

The Elementary and Secondary Education Act of 1965 establishes a number of programs to aid elementary and secondary education, primarily through the public schools of the various states. Two provisions, however, have been administered by Federal and local authorities as authorizing, if not mandating, aid to nonpublic schools, including those operated by sectarian institutions. Section 205(a) (2) of Title I states that programs under that Title designed to aid local public school agencies in providing programs for the education of children of low income families shall be approved only if they provide that,

to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. * * *

Section 203(a)(2) of Title II provides that states submitting plans for grants under that Title for the acquisition of school library resources, textbooks and other instructional materials shall provide for

acquisition of library resources (which for the purposes of this Title means books, periodicals, documents, audio-visual materials and other related library materials), textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools. * * *

The complaint herein alleges, and, as the case now stands, it is not denied, that the defendants have approved and will continue to approve programs entailing use of Federal funds "to be used to finance and aid, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in sectarian or religious schools" and to finance "the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." The complaint further alleges that this use of Federal funds violates the First Amendment to the United States Constitution, which provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

The constitutional issue thus raised is one of far-reaching practical importance. The 1965 Act, which culminated decades of agitation for Federal aid to local public education, made a beginning in what may well become a much larger program in the years to come. In doing so, it purported to solve the issue of aid to sectarian schools by providing for their inclusion in the various statutory programs.

There was wide recognition in Congress that this action raised substantial questions under the Free Exercise and Establishment Clauses of the First Amendment. Proponents of the Act urged that the Constitution does not bar use of tax funds to finance educational benefits for children attending schools operated by religious bodies. Opponents claimed that this "child benefit" theory was simply a circumvention of a constitutional principle of long standing barring use of government funds for support, direct or indirect, of religious schools for any purpose.

Enactment of the statute thus posed a constitutional issue of profound importance. Its resolution will shape the nature of Federal programs in aid of education for the foreseeable future. If the Court holds that the Constitution bars the use of Federal funds to finance the operation of schools maintained by religious bodies, Congress will be able to proceed in this important area without constant turmoil as to the share to be allotted to religious schools. If it holds otherwise, and thereafter determines just which forms of aid are permissible and which are not, Congress will be able to legislate accordingly. We submit, however, that it would be disastrous to leave the issue unresolved and open to constant political agitation and local conflict. Yet, that is what the Government here in effect urges.

**B. Judicial Review Is an Integral Part
of Our Constitutional System.**

Judicial review of constitutional issues is an integral part of our judicial system. As de Tocqueville said well over a century ago, practically every political question in America sooner or later becomes a judicial question. De Tocqueville, *DEMOCRACY IN AMERICA*, chap. 6, *Judicial Power in the United States* (1835). As stated more recently by Professor Louis Jaffe (*The Right to Judicial Review*, 71 *Harvard Law Review* 401 (1957)): “* * * availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity” (at 403). “The constitutional courts * * * are acknowledged architects and guarantors of the integrity of the legal system” (at 409).

This aspect of our political system has worked well for nearly 200 years. Particularly in the last 30 years, it has given new life and effectiveness to the great guarantees of the Bill of Rights. The rights of persons charged with crime, of minority groups denied equal protection of the laws, of dissident groups generally have been recognized and strengthened.

During the last three decades, litigation has come to be the expected, normal process of obtaining both interpretation and enforcement of Bill of Rights guarantees. Bill of Rights issues are now expected to be settled by litigation seeking ultimate resolution by this Court. Few now fear such litigation even when brought by unpopular groups seeking to disturb the *status quo*. That outmoded fear, which is the mainstay of the Government's case here, was

explicitly repudiated in *NAACP v. Button*, 371 U. S. 415 (1963), where this Court nullified the effort of a state to curtail litigation seeking enforcement of the Equal Protection Clause. Justice Brennan, speaking for the Court, said (at 430):

* * * under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

Justice Harlan, who dissented in that case, nevertheless agreed on the necessary role of such litigation in our constitutional system. He said (at 452-3):

Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. [Citations omitted.] And just as it includes the right jointly to petition the legislature for redress of grievances [citation omitted], so it must include the right to join together for purposes of obtaining judicial redress. We have passed the point where litigation is regarded as an evil that must be avoided if some accommodation short of a lawsuit can possibly be worked out. Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights.

The principle that in a democracy there should be legal machinery by which the violation of a constitutional right may be redressed is an application of the even broader concept that we have a "government of laws" as contrasted with a "government of men." As Justice Jackson said, concurring in *Youngstown Sheet and Tube Company v. Sawyer*, 343 U. S. 579, 646 (1952), " * * * ours is a government of laws, not of men, and * * * we submit ourselves to

rulers only if under rules." The thought underlying this concept is that the conduct of all persons should be governed and controlled by rules of general applicability and not by the whims or caprices of a dictator or his underlings. This Court has referred to the "cardinal precept upon which the constitutional safeguards of personal liberty ultimately rests—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy." *Jones v. Securities and Exchange Corporation*, 298 U. S. 1, 23-24 (1935).

Rules can fulfill their function of universal application only if there exists an *independent* authority which may be called upon to interpret them in cases where questions as to their meaning arise. Unless there is a method for obtaining legal review, under a rule of law, the constitutional provision in question will have in each case the meaning which the government body applying it chooses to give it. Various officials may well read the same rule in different ways depending on their personal views and outlooks.¹ Thus, we would have a system where the "man" rather than the "law" determines what a person may or may not do, or what is legal or illegal.

1. It should be remembered that the present suit challenges not only the Congressional decision to provide various forms of aid to children attending sectarian schools but also the manner in which that decision is being carried out by government officials. The complaint asserts that Congress intended that the Act would be administered without violating the principle of separation. Without judicial review, the only procedure for correction of unconstitutional administration of the Act would be the impractical process of detailed amendment of the Act by Congress as each new violation of its intent was called to its attention.

Judicial review provides a necessary safeguard against variant and even arbitrary or capricious interpretation and application of rules by whichever government official happens to be applying them. "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." Mr. Justice Brandeis, concurring in *St. Joseph Stockyards Company v. United States*, 298 U. S. 38, 84 (1936).

It follows that the degree to which a given country is a government of laws rather than of men can be measured by the extent to which independent courts are available for the determination of what the law is and for review of the interpretation of the law by administrative officials. Hence, judicial review of administrative determinations in a country governed by laws is most vital and necessary.

The goal of a "government of laws" rather than "of men" has been acknowledged and applied in common law and equity. From the very beginnings of Anglo-American jurisprudence it has been a maxim of common law that "remedies for rights are ever favorably extended." 18 Vines' Abridgement 521, Coke on Littleton, 153a, b. Courts of equity have also followed the basic principle that wrongs must be remedied. "The maxim that equity will not suffer a wrong to be without remedy, is probably the most important of the principles which are addressed to the court or chancellor." 19 AM. JUR., Equity, Section 451.

The logical nexus between this maxim and the principle of "government of laws" is clear: Whenever a violation of the law which results in the negation of a legal right of one or more individuals remains without the possibility of redress, the principle of a government of laws has to that extent broken down, giving way to a government of men.

C. Permitting Suits by Taxpayers Is Necessary to Resolution of the Constitutional Issue Involved in this Case.

If appellants are not permitted to obtain judicial resolution of the constitutional issue here involved, there will be no such resolution. The government, which insists that appellants have no standing, offers no suggestion to the contrary.

It is true that alternative ways of obtaining judicial review of these issues have occasionally been suggested but they can hardly be taken seriously. This is illustrated by exchanges that took place at the Senate hearings in 1966 on a bill to provide judicial review in the area here involved (Hearings before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess. on S. 2097).

The views of the Department of Justice in opposition to the bill were presented by Assistant Attorney General John W. Douglas (pp. 75-102). Pressed by members of the Committee to indicate how, if at all, the constitutional issues arising out of Federal aid to education programs, which include parochial schools could be resolved in the courts, Mr. Douglas referred to two cases then pending

(83-84). One was a challenge of a "Headstart" program under the Economic Opportunity Act being conducted in a parochial school in Missouri. He assumed that there was no question as to standing in that case since the children were being forced to go to a parochial school to take advantage of the "Headstart" program. That case (*Alenderfer v. Human Resources Corp.*, Circuit Court of Jackson County, Missouri) never reached a constitutional adjudication since the program originally challenged was for the summer of 1965 only and the Federal allotment had been spent by the time the case was filed. It was ultimately withdrawn.

The other case suggested by Mr. Douglas was one pending in a Federal Court in Michigan challenging the use of state funds for certain programs in sectarian schools. Manifestly, this suggests no way of challenging Federal programs. (In that case, a three-judge court ruled that it would abstain from deciding the case until the statute had been considered by the state courts. *O'Hare v. Detroit Board of Education*, order issued February 20, 1967, not officially reported (D.C., E.D., Mich., Civil Action No. 27899).)²

Other representatives of the Government who testified at these hearings suggested similarly remote possibilities of litigation. Thus, the statement submitted by Donald M.

2. It has been suggested that, since taxpayers' suits are permitted in most states and decisions in such suits are reviewable in this Court if they raise Federal questions, issues raised as to Federal appropriations can be resolved by analogy from whatever rulings on state programs may be obtained. This view that government officials will abandon programs they administer on the strength of rulings not applicable to them finds little support in history. The American people should not have to rely on such a doubtfully effective means of securing their rights.

Baker, General Counsel of the Office of Economic Opportunity, suggested (Hearings, *supra*, at 134):

• • • Any member of a class of intended beneficiaries of a community action program would apparently have standing to raise first amendment questions if he claimed that as a condition of receiving benefits he was required to sacrifice his rights under that amendment,
• • •

This suggestion applies to Free Exercise Clause cases but not to those arising under the No-Establishment Clause. Finally, Theodore Ellenbogen, Assistant General Counsel of the Department of Health, Education and Welfare, stated that a taxpayer would have standing to refuse to pay a tax if it was "earmarked, let us say, for a particular purpose • • •" (*Id.* at 29). The programs here involved, of course, are not funded by such earmarked taxes.

In this proceeding, the Government has not suggested any more likely procedures. It has virtually admitted that, if its position in this case is upheld, even the most direct financing of specific religious activities in plain violation of the No-Establishment Clause, could not be halted. We submit that that is not the way our constitutional system of checks and balances is supposed to operate. As stated by Senator Sam J. Ervin, Jr., in the hearings referred to above (*Id.* at 89):

• • • when the Founding Fathers set up the Federal courts, the Supreme Court of the United States, and authorized Congress to set up the inferior courts, they authorized the existence of those courts in order that there might be a check against violations of the Constitution by Congress.

D. The 1965 Act Was Approved by Congress on the Assumption that Constitutional Issues Raised by Its Terms or Administration Would Be Judicially Resolved.

The doctrine of *Frothingham v. Mellon*, 262 U.S. 447 (1923), on which the Government principally relies, is not one of constitutional law but rather one of judicial policy adopted by this Court for reasons of administration. Senate Committee Hearings, *supra*, Statement of Professor Paul A. Freund, pp. 498-9. As such, it can and, we believe, should yield if it appears that Congress intended that judicial review of its action was both possible and desirable. We submit that Congress has manifested such an intent here and that that intent should not be frustrated.

One of the subjects that received much attention in Congress during the debates on the 1965 Act was the question of judicial review. This discussion arose because it was generally recognized that the very provisions of the bill challenged in this suit raised serious constitutional questions under the First Amendment. It was primarily because of those provisions that an effort was made in both the House and the Senate to add a specific authorization of judicial review to the bill.

During the debate, Congressman Emanuel Celler, Chairman of the House Judiciary Committee, read a statement explaining that an explicit provision authorizing judicial review was unnecessary since avenues of access to the courts would be available. He said (111 Cong. Rec. 5929-30 (1965)):

There is no aspect of this bill which raises issues of any significance in the field of church and state that will not be subject to judicial review * * * State and federal law already makes available judicial remedies against executive action in practically every situation where a remedy could, as a constitutional matter, be provided * * *

Unless there is a "case or controversy"; that is, unless the suit is justiciable, the Constitution forbids the Federal court from considering the matter. If the case is justiciable and a constitutional question is involved, like church and state, whether we accept or reject the amendment providing for review, the case will be [adjudicated] * * *

This right to judicial review can be described and channeled by legislation, but the right already exists and does not need to be specifically mentioned in this legislation in order to make it available.

Congressman Celler's view was echoed by others. Thus, Congressman Charles E. Goodall, a member of the House Committee on Education and Labor which reported the bill, said, "The constitutional issue must be decided initially by each member of Congress to his own understanding and ultimately, if a proper case arises, by the Supreme Court * * *" (111 Cong. Rec. 5771). Congressman Leonard Farbstein said: "I believe, and have been informed by knowledgeable sources, that the bill is constitutionally correct * * * at worst it is a calculated risk that can be corrected by the courts if in error." (*Id.* at 5962.)

On this record, the action of the House in rejecting the proposed judicial review amendment by a vote of 154 to 204 (*Id.* at 5942-3) and its subsequent approval of the bill

without a judicial review provision was based on the assumption that the hotly disputed constitutional issues would be judicially resolved.

When the bill was sent to the floor of the Senate by the Senate Committee on Labor and Public Welfare, that Committee reported that it had rejected a judicial review provision at least partly because constitutional issues could be raised under general doctrines of judicial review as well as under several specific provisions in the Act permitting judicial review of certain rulings and activities of the Commissioner of Education. The Committee said (S. Rep. No. 146, 89th Cong., 1st Sess., p. 35):

The committee considered carefully recommendations to it in testimony that an explicit provision be added to afford judicial review of the constitutionality of provisions of the act and of its administration. After consideration of all facets of the problems, it was the general view of the committee that in this legislation such a provision is unnecessary *in view of the developing state of the law on the subject*. The committee, in considering the matter, discussed the following factors: (1) Litigation raising analogous issues is presently pending before courts of at least one State, and could reach the U. S. Supreme Court. *In view of the recent Supreme Court decisions in the school prayer cases, which also rose in State courts, it would appear more likely than ever before that the issues under this act could similarly be tested.* (2) Since the determination of the Supreme Court against taxpayers' suits in *Massachusetts v. Mellon* (262 U. S. 447 (1923)), *there have been subsequent decisions which also suggest the possibility of a test in the Federal courts of the provisions of this act in the absence of specific language. Larson v. Domestic and Foreign*

Corporation (337 U. S. 682, 689, 690 (1948)), was cited as an example. (3) The bill presently contains three specific and limited judicial review provisions, which parallel those in other Federal education legislation: section 211 of title I, section 206 of title II and section 509 of title V. It is possible that these issues can also be raised in suits brought by states against the Commissioner of Education under those provisions. (4) It is not the practice to insert broad judicial review clauses in Federal legislation, particularly as this might be construed as an invitation to multiplicity of time consuming suits which could bring to a temporary halt an enormous range of Federal activities. (Emphasis supplied.)

Persuaded by this Report, the Senate defeated the judicial review amendment sponsored by Senator Sam Ervin by a vote of 32 to 53 (111 Cong. Rec. 7345).

The portions of the Senate Report emphasized above are particularly significant. They plainly show acceptance of the concept that judicial enforcement of the Bill of Rights, and particularly of the First Amendment, has been, and should continue to be, expanded. The reference in the Report to "the developing state of the law on this subject" may be viewed as an invitation to this Court to hold that the *Frothingham* doctrine is inapplicable to the issues which it was known the new law would present.

E. This Court Has Recognized the Need to Grant Standing in Order to Insure Correction of Constitutional Violations.

This Court has made it plain that many considerations bear on whether it will confer upon a party the opportunity to present his claim in non-traditional litigation. As this Court said in *United States ex rel. Chapman v. Federal Power Commission*, 345 U. S. 153, 156 (1953), standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event *more or less determined by the specific circumstances of individual situations*, * * *" (Emphasis added.)

The decisions bear out this generalization. In *Barrows v. Jackson*, 346 U. S. 249 (1953), this Court pointed out that, although traditionally only a party whose rights had been directly infringed had standing to rely on a constitutional guarantee, this was not a rule dictated by any provision in the Constitution but was, rather, a rule of self-restraint. It said (at 257):

Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, *which is only a rule of practice*, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. (Emphasis supplied.)

It was there held, as to standing, that a white seller of property who breached a restrictive covenant by selling to non-Caucasians could rely on the Equal Protection Clause as a defense to a co-covenantor's damage claim. As the above quotation shows, this Court recognized that, if the defend-

ant was not allowed to do so, "fundamental rights * * * would be denied."

"Fundamental rights" likewise would have been denied in *NAACP v. Alabama*, 357 U. S. 449 (1958) if the N.A.A.C.P., which was resisting the efforts of the State of Alabama to compel it to disclose the names of its members, had been barred from asserting that the rights of its members to freedom of association under the Due Process Clause of the Fourteenth Amendment would be curtailed by such disclosure. This Court again made clear that rules normally limiting standing would not be permitted to prevent the assertion of a highly valued constitutional right, and that effective vindication would have been difficult if standing were denied. This Court said (at 459):

The principle [of standing] is not disrespected where constitutional rights of persons who are not immediately before the Court *could not be effectively vindicated except through an appropriate representative before the Court.* (Emphasis added.)

In *Bantam Books v. Sullivan*, 372 U. S. 58 (1963), the plaintiff book publishers were allowed to assert the right to freedom of expression under circumstances where it was the distributors of the books, rather than the out-of-state publishers, who were threatened with prosecution under anti-obscenity legislation. Manifestly, a strict ruling as to standing would have limited assertion of this claim to the distributors. This Court, however, noted that the concept of "legal injury," which is the essence of standing, depends on many factors, not the least of which is the pragmatic one treated as decisive in the *Barrows* and *N.A.A.C.P.* cases, *supra*—that, if standing were denied, in all likelihood the

constitutional requirement would go unenforced. This Court said (at 64 n. 6):

Finally, pragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied. Cf. *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U. S. 449, 459.

In *Griswold v. State of Connecticut*, 381 U. S. 479 (1965), this Court again recognized that if the right to sue were denied, it was likely that the substantive right would likewise be denied. Hence, two birth control counsellors were permitted to assert Due Process rights of their counsellees. The Court said (at 481):

The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.

These and other cases³ bear out the opinion expressed in the Senate Committee Report on the 1965 Act, *supra*, that "the developing state of the law" on the subject of standing warrants a decision permitting this action. In each case, the right involved was so highly valued that its enforcement was insured by conferring standing on persons who had been injured in somewhat less than a specific, measurable

3. Notably, the cases upholding standing to raise questions concerning legislative apportionment: *Baker v. Carr*, 369 U. S. 186 (1962); *Wesberry v. Sanders*, 376 U. S. 1 (1964).

way. Underlying the cases is the proposition that it is not healthy, in a constitutional system of government, to tolerate unremedied constitutional violations affecting the democratic process. If the existing rules of procedure for enforcing a provision of the Constitution do not suffice, other rules will be developed.

In the cases above, it was found that the person who was directly injured by the violation, and who could therefore assert constitutional claims under the usual rules, was in fact unlikely, or not in a position, to do so. This was held to be sufficient ground for departure from the normal criteria of standing. Here, the argument against the appellants' standing is not that they are asserting the rights of others but that, though they may be injured, their individual injury is too small a fraction of the total injury to warrant standing. It is not and cannot be claimed that there is no injury. This would be equivalent to saying that violation of the Establishment Clause creates no injury and that the Establishment Clause is therefore a nullity. There is an injury. And, as in the cases cited above, it will go uncorrected unless this action is permitted since, as we have shown, no one else can raise the issue. That, we submit, is a sufficient basis for upholding appellants' standing.

This principle, we submit, has been given at least implicit application by this Court under the Establishment Clause. In *Engel v. Vitale*, 370 U. S. 421 (1962) and *Abington School District v. Schempp*, 374 U. S. 203 (1963), it was held that certain religious practices in public schools violated the Establishment Clause of the First Amendment. In *Engel*, the plaintiffs were suing as parents of children attending the affected schools. In *Schempp*, the plaintiffs included both parents and children. With respect to the

Establishment Clause, this Court specifically held that there was no need to show any restrictive effects on the children of the plaintiffs. It was sufficient that the practices had the effect of giving state support to religion. Thus, it said, in the *Engel* case (370 U. S. at 430):

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

As to the establishment aspect of those cases, it is difficult to see how the plaintiffs had any clearer standing than any other citizen or taxpayer. While the children were physically involved in the challenged practices, the injury caused by the violation of the Establishment Clause—government support of religion—did not affect them in their status as school children. Hence, their involvement was hardly more than that of any other citizen.

Justice Brennan addressed himself to the question of standing in his concurring opinion in the *Schempp* case, even though it had not been raised by the parties. He concluded (374 U. S. at 266, n. 30):

*** to deny him [a parent] standing either in his own right or on behalf of his child *might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment*—even though no special monetary injury could be shown * * * (Emphasis added.)

The large-scale financing of the operation of sectarian schools out of Federal tax monies is, we submit, a "serious breach of the prohibitions of the First Amendment," as to which judicial review should not be foreclosed.

**F. Standing Should Not Be Denied Here
on Any Theory of *De Minimis*.**

The mainstay of the government's case here is, *Frothingham v. Mellon*, 262 U. S. 447 (1923), in which this Court rejected a taxpayer's suit challenging a Federal appropriation, holding that the taxpayer's interest was too small to warrant his invoking the judicial process. We submit that the concept of *de minimis* has no application to cases of this kind.

More than twenty years ago, this Court gave pointed expression to the high place held by the guarantees of the First Amendment. In *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639 (1943), it said:

The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

A year later, in *Thomas v. Collins*, 323 U. S. 516, 530 (1944), this Court referred to "the preferred place given in our scheme of the great, the indispensable democratic freedoms secured by the First Amendment. * * *" See also *Kovacs v. Cooper*, 336 U. S. 77, 88 (1949). This "preferred place" cannot be effectively assured unless the road to judicial enforcement is kept open.

Stripped to its essentials, the *Frothingham* decision said to the plaintiff, in effect, "Since you are not hurt

financially by this appropriation to any significant extent, you lack standing to attack it." It is our contention that, where hurt to conscience by way of intrusion upon a constitutionally protected right is involved, it is immaterial how much or how little the plaintiffs may be injured monetarily.

The origins of the concept of separation in our constitutional system show that the amount of potential or actual pecuniary loss to the individual citizen is irrelevant to a determination of injury. Madison's *Memorial and Remonstrance Against Religious Assessments* of 1785, which articulated the philosophy that is instinct in the First Amendment, was a protest against any tax for religious purposes, no matter how small. He argued that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." Thus it was not the amount of the tax, but the compulsory exaction of any amount from a citizen to aid or support religious activity that the Founders plainly intended the First Amendment to proscribe.

The significance of this aspect of the Establishment Clause was recognized by this Court in its classic formulation of the meaning of the clause in *Everson v. Board of Education*, 330 U. S. 1, 15-16 (1947):

The "establishment of religion" clause of the First Amendment means at least this: * * * No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may

be called, or whatever form they may adopt to teach or practice religion.

If the Establishment Clause bars the imposition of "small" taxes, the courts must be open for enforcement of that bar.

This Court's decision in *Baker v. Carr*, 369 U. S. 186 (1962), shows that even a slight fractional injury can be the basis for standing to sue where fundamental democratic values are involved. There, the complaint alleged that the existing Tennessee legislative apportionment debased the votes of the plaintiffs, in violation of the Equal Protection Clause of the Fourteenth Amendment. No pecuniary injuries to the plaintiffs was claimed; the only injury was a slight fractional loss in the value of the plaintiffs' votes. It can hardly be imagined that this impairment of the votes of the individual plaintiffs would ever have any significant impact on the outcome of any election. Yet this Court found standing. It framed the issue in the following terms (at 204):

Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

We submit that plaintiffs here plainly meet that test.

Another illustration of the precept that a citizen's power to enforce basic rights need not be restricted by the criterion of substantial damage is afforded by *Hawke v. Smith*, 253 U. S. 221 (1920). In that case, this Court held unanimously that a provision in the Ohio Constitution requiring a referendum on ratification of proposed amendments to

the Federal Constitution was in conflict with Article V of the Federal Constitution. The suit was instituted by a citizen taxpayer to enjoin allocation of public funds for a referendum on ratification of the proposed Eighteenth Amendment. Plaintiff's individual interest in the matter was certainly minimal; yet this Court had no difficulty with respect to his standing to sue.

Congress has also recognized the impropriety of putting a price label on the right to enforce fundamental constitutional guarantees. The general jurisdiction of Federal courts to entertain suits arising "under the Constitution, laws or treaties of the United States" under 28 U.S.C. 1331a, is limited to cases where the amount in controversy exceeds \$10,000. Under Section 28 U.S.C. 1343, however, the District Courts are given jurisdiction, without regard to the amount in controversy, in suits to vindicate "any right or privilege of a citizen of the United States" or to enforce any provision or statute providing "for equal rights of citizens or of all persons within the jurisdiction of the United States." "A complaint which is so drawn as to seek redress for any wrong specified in 28 U.S.C.A. §1343 establishes * * * district court jurisdiction under the latter statute, regardless of the amount in controversy." *Agnew v. City of Compton*, 239 F. 2d at 229 (C.A. Cal.), *cert. den.*, 353 U. S. 959 (1957). Accord: *Walton v. City of Atlanta*, 181 F. 2d 693 (C.A. Ga.), *cert. den.*, 340 U. S. 823 (1950).

The fear has been expressed that, if suits by ordinary taxpayers were to be freely permitted on First Amendment grounds, an unmanageable flood of litigation would ensue. We submit that this fear is without substance. Almost

every state permits taxpayer suits to challenge alleged misappropriations of state funds. Yet state courts have not been inundated by taxpayer litigation. Nor has there been an uncontrollable wave of suits on First Amendment grounds by parents of school children merely because this Court permitted such actions in *Everson*, *Engel* and *Schempp*, *supra*. It is apparent that there are other deterrents, such as time and expense involved, that effectively limit the initiation of lawsuits. In any event, it would be a strange argument that the mere possibility of increased litigation should warrant denial of access to the courts by withholding from American citizens the standing to seek to enforce fundamental constitutional guarantees. Constitutional rights that may not be vindicated and protected are hollow rights.

Conclusion

It is respectfully submitted that it is in the public interest for the courts to accept jurisdiction and resolve disputed issues where there is an authentic controversy and a *bona fide* action on religious grounds, regardless of whether or not the plaintiff is able to prove any direct financial damage beyond that sustained by the average citizen or taxpayer. The decision below should therefore be reversed.

Respectfully submitted,

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December, 1967

DEC 29 1967

NO. 416

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

FLORENCE FLAST, *et al.*,
Appellants,

v.

JOHN W. GARDNER, *et al.*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

BRIEF FOR THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 129 national and international (*i.e.*, having members also in Canada) labor organizations having a total membership of approximately 14 million. The AFL-CIO is filing this brief for the following reasons:

1. The American labor movement has throughout its history striven for maximum educational opportunity for all children. Unions played a major role in the establishment of public schools early in the nineteenth century, and have continuously worked for the extension and improvement of public education. In line with this concern, the AFL-CIO, beginning in 1955, and before that the AFL and CIO sep-

arately, actively worked to secure the enactment of legislation to provide federal aid to elementary and secondary schools.

While there was fairly widespread recognition in the Congress of the urgent need for federal aid to education, proposals for federal assistance to primary and secondary schools were blocked for some years by controversies over racial integration and over whether church-connected schools, or their pupils, should be included in federal aid programs. Some southern Congressmen who at one time supported federal aid came to oppose it because it might implement racial integration, while certain other Congressmen were unwilling to support federal aid without some participation for parochial schools or their pupils. The 1963 AFL-CIO Convention, in its resolution on "Education," accordingly declared itself in favor of withholding federal aid from segregated schools, but as favoring a compromise on aid to pupils in church-connected schools for "resolving the bitter controversy that has so far blocked efforts to enact substantial federal aid for education."

Such a compromise was, with great difficulty, finally worked out in the Congress, and is embodied in the Elementary and Secondary Education Act of 1965. Title I of that Act provides for federal grants to public schools in "areas having high concentrations of children from low-income families." Congress authorized in excess of one billion dollars for grants under this Title in the first year. Title II of the Act provides for federal grants to States for programs to buy textbooks and library books for use in both public and private elementary and secondary schools. One hundred million was authorized for this program the first year. Thus, while only a minor portion of federal aid goes to benefit pupils in church-supported schools, they are not totally excluded from all participation.

The present suit attacks this Title II aid to private schools which are church-connected as violating the establishment of religion clause. If the Court holds that the plaintiffs have standing to maintain this suit, and if they ultimately prevail on the merits, the solution of the church-connected school problem, which was worked out by the Congress only after years of travail and delay, will be invalidated. Further, the AFL-CIO believes that any holding banning all aid of any type to church-connected schools would probably destroy the entire program of federal aid to secondary and primary schools. It is the best judgment of the AFL-CIO that federal aid to education cannot be preserved at the present time, any more than it could be enacted in the first place, without the votes of some Congressmen who will not support a program which wholly excludes church-connected schools from all participation.

Presumably some, at least, of the plaintiffs, and of the organizations supporting them, do not wish to torpedo federal aid to education, but believe that it can be saved even if all aid to private schools is barred by court decree. The judgment, and experience, of the AFL-CIO is otherwise.¹

2. We are convinced that the doctrine of *Frothingham v. Mellon*, 262 U.S. 447, that federal taxpayers cannot litigate the legality of disbursements by the Federal Government, best serves the long-run interests of the United States. We believe that a contrary rule could unduly restrict the activities of the Federal Government, could hamstring adminis-

¹ A news story in the Washington Post, November 26, 1967, p. 1, states:

"Federal officials hope that the 1965 compromise settled the issue of relations between church and state. But six suits have already been filed to attack it.

"If any of these suits succeed, benefits to parochial school children will be reduced. And that, in turn, will jeopardize the uneasy alliance in Congress that passes the annual school aid appropriations."

tration, could exacerbate relations between the judicial and other branches of the government, and could alter radically and undesirably the existing division of powers among the three branches of government.

3. We do not think that any distinction can or should be drawn whereby federal taxpayers may challenge disbursements under the establishment of religion clause, but not as violative of other constitutional or statutory provisions. Further, we believe that taxpayers' suits even if so restricted would still have a major mischief potential.

4. The Senate passed, during 1967, a bill, S. 3, introduced by Senator Ervin, which empowers any taxpayer, and, indeed, any citizen, to sue to challenge the validity, under the establishment of religion clause, of federal grants and loans under nine enumerated statutes, including the Elementary and Secondary Education Act of 1965.² The House Judiciary Committee did not act on this proposal; and the Senate responded by adopting, in December 1967, a rider to the appropriation for the Elementary and Secondary Education Act authorizing suits to challenge disbursements under that Act as violative of the establishment clause. This rider was dropped in conference when assurances were given by the Chairman of the House Judiciary Committee that the House would consider S. 3 at its Second (1969) Session. (See Congressional Record, Daily Print, December 15, 1967, pp. S. 18949-S. 18954).

The AFL-CIO Convention, meeting in December, 1967, expressed its strong opposition to these and any similar proposals.³ The same considerations which lead the AFL-CIO

² The 1966 Hearings on S. 2097, a predecessor of S. 3, contain a wealth of material bearing on the policy issues raised by the present suit. See *Hearings on S. 2097 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess.* (1966).

³ The Convention resolution is printed as Appendix A hereto.

to oppose these legislative proposals apply to this suit, which seeks to achieve approximately the same results without legislation.

ARGUMENT

I

THE DOCTRINE THAT TAXPAYERS MAY NOT LITIGATE THE VALIDITY OF FEDERAL DISBURSEMENT IS SOUND POLICY

During the nearly two hundred years of this country's independent existence taxpayers have, with rare exceptions, not been able to litigate the validity of disbursements by the federal government. As early as 1793 the Justices of the Supreme Court advised President Washington that the separation of powers established by the Constitution between the three branches of government precluded the Court from rendering advisory opinions to the Executive,⁴ and in *Frothingham v. Mellon* the Court, in holding that a taxpayer could not litigate the constitutionality of expenditures by the Federal Government, reiterated that "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional." 262 U.S. at 488. Only when disbursements have been explicitly linked to particular taxes have taxpayers been able to challenge their validity, and the current standing of these exceptional cases⁵ is far from clear.

We contend that this unavailability of a federal taxpayers suit has served the national policy well, and that a contrary doctrine would have served it ill.

⁴ See *Muskrat v. United States*, 219 U.S. 346.

⁵ E.g., *United States v. Butler*, 297 U.S. 1; *Helvering v. Davis*, 301 U.S. 619. Cf. also *Ashwander v. TVA*, 297 U.S. 288.

Some Presidents have taken an exceedingly restrictive view of the federal spending power.

Thomas Jefferson believed the Louisiana purchase violative of the Constitution, but went ahead anyway. He wrote John Dickenson, (August, 1803) that " * * * we must ratify, and pay our money, as we have treated, for a thing beyond the Constitution, and rely on the nation to sanction an act done for its great good, without its previous authority."⁶

In 1859 President Buchanan vetoed an act granting public lands to the States to support colleges to teach "agriculture and the mechanic arts, " * * * in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life." In his veto message President Buchanan declared:

"I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes out of the people of the United States, for the purpose of educating the people of the respective states."⁷

The bill actually rested on the power of Congress, under Article IV, Section 3, to dispose of "the Territory and other Property belonging to the United States"; but Buchanan asserted that this provision and the spending clause had the same reach; and that as to both "the Constitution confined Congress to well defined specific powers."

Similarly, in 1887 President Cleveland vetoed an act appropriating \$10,000 for the purchase and distribution of seeds in drought-stricken counties of Texas. His veto message declared:

⁶ FOLEY, THE JEFFERSONIAN CYCLOPEDIA (1900), §4806, p. 510.

⁷ V RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENT 547-549 (1909).

"I can find no warrant for such an appropriation in the Constitution and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit."⁸

However, most Presidents, fortunately as we think, have taken a broader view of the spending power. The aid to education bill which Buchanan vetoed became law as the Morrill Act in 1862 (Act of July 2, 1862, c. 130, 12 Stat. 503), and its quaint language is still part of the U.S. Code. See Title 7, §301 ff. (Incidentally, neither the Morrill Act nor any other in the long series of subsequent federal grants to promote higher education made any distinction between public and private institutions or between church-connected and non-church-connected institutions.⁹)

Thus up until now the Federal Government has, during most of its existence, functioned on the basis of a broad view of the federal spending power, though a few Presidents (and perhaps Congresses) have adhered to more restrictive views.

⁸ VIII RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 557 (1909):

⁹ Statement of Dr. John T. Fey, Representing the American Council on Education and the Association of American Colleges, *Hearings on S. 2097 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess., pt. 1, at 185-186 (1966):

"* * * Beginning with the Land-Grant Act of 1862 there has been a continuing procession of Federal provisions for the support of education in both public and private institutions. No distinction has been made between public and private universities and colleges in ROTC programs support, training grants, medical and health-related facilities grants and in numerous other programs * * *

"There are 973 regionally accredited private institutions of higher education in the United States and of these a large proportion might in some way be considered to be church-related."

What then would have been the situation if the Court during those 180 years had exercised power to pass on the constitutionality of federal disbursements? During much of that time a strict constructionist view prevailed on the Court as respects the general reach of federal power, and it seems likely that a rather narrow view of the spending power would similarly have been taken. If so, activities involving federal disbursements would have been curtailed not only during periods when the President or Congress took a restrictive view of the spending power, but also whenever the Court held to that view.

Two results would in all probability have ensued.

In the first place the spending powers of the Federal Government would have been narrowly restricted over considerable periods of time. We do not think that would have been a happy result.

In the second place hostile confrontations between the judicial and executive branches, such as that which took place in the time of Thomas Jefferson and that which culminated in the "court packing" proposal of 1937, would have been more frequent and more bitter. We do not think that would have been a happy result either.

For example, although the Court in *United States v. Butler*, 297 U.S. 1, pronounced in favor of the Hamiltonian over the Madisonian interpretation of the general welfare clause, a reading of *Ashwander v. TVA*, 297 U.S. 288, decided at the same term, leaves the impression that a majority of the Court would at that time have held TVA to be beyond the powers of the Federal Government if the Court had undertaken to pass on the validity of the project as a whole.

Professor Kenneth Culp Davis, who is the leading academic critic of *Frothingham* and an advocate of federal

taxpayers' suits, thinks it regrettable that the Court has never passed on the constitutionality of TVA. In a statement in support of a bill (discussed *supra* p. 4) to authorize federal taxpayers' suits, he declared:

"Much is lost by continued uncertainty about constitutionality of spending programs, whether they have been enacted or whether they are under consideration for enactment. No lawyer today knows or can know on the basis of judicial pronouncements whether or not the TVA is constitutional; the courts have not spoken because no one has had standing to raise the question." (*Hearings on S. 2097 Before the Subcommittee on the Judiciary, 89th Cong., 2d Sess., pt. 2, at 494 (1966).*)

We disagree totally with Professor Davis. We think that no useful purpose would be served today by permitting taxpayers to challenge the constitutionality of TVA, and that it would have been exceedingly unfortunate if they had been able to challenge it in 1935 or 1936. A great and much needed public project might have been destroyed; and the confrontation between the Court and the other branches of the Government, serious enough as it was, might well have been exacerbated. We think that the Court of that period, which was not always notable for self-restraint, took the wise course in *Alabama Power Co. v. Ickes*, 302 U.S. 464, when it adhered to *Frothingham*.

To take another example, immediately after the *Ashwander* decision the Court, on motion of Solicitor General Reed, dismissed *United States v. Certain Lands in the City of Louisville*, 297 U.S. 726 (1936), in which the Court of Appeals for the Sixth Circuit had held (78 F.2d 684) that the Federal Government had no power under the Constitution to condemn land for a housing project. Because of the *Frothingham* doctrine the Government was able, by dropping projects requiring land condemnation, to avoid a

critical test in this Court, at a time when the auspices were unfavorable, of the Federal Government's power to spend money for public housing. Ten years later the Court brushed aside in a single sentence a claim that the federal housing program was unconstitutional. *City of Cleveland v. United States*, 323 U.S. 329, 333 (1945). Would it have been better for the Court or the country if the issue could have been adjudicated ten years earlier in a taxpayer's suit? We think not.

Basically Professor Davis, and other advocates of federal taxpayers' suits, believe that only the courts can be trusted to insure observance of the Constitution, and that every action of the Federal Government should be subject to judicial review. Professor Davis has declared:

"In 1923, before significant development of the Federal spending power, a system of judicial review of legislation could be sensible without a judicial check on the legality of spending, but as of 1966 a system of judicial review of legislation which does not reach spending omits about half the total impact of the Federal Government's programs. Surely no one planned and no one would plan a system of reliance on courts to check about half of what the Government does and not the other half, when both halves are about equally in need of check. * * * The time has come to re-examine the fundamentals of the unplanned system we have drifted into. The time has come, in my opinion, to make use of our American institution of judicial review not merely for half of our governmental functions but for all of them." (*Hearings, op. cit. supra note 2*, pp. 493-494.)

Again, we wholly disagree with Professor Davis.

We do not believe that the courts are the sole safeguard of the Constitution. We agree, rather, with the views expressed by Erwin N. Griswold, then Dean of the Harvard Law School and now Solicitor General. He said:

"The vice in the proposal to have 'taxpayers' suits,' it seems to me, lies in the idea that ultimate power in our country should reside with the courts. I am a great believer in our courts, and have worked hard to support them at various times, and in many ways. But, as Justice Stone said more than 30 years ago in his famous dissenting opinion in *United States v. Butler*, 297 U.S. 1, 87, 'Courts are not the only agency of government that must be assumed to have capacity to govern.' And as Justice Holmes said in *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U.S. 267, 270, 'It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'

"We have gone very far in our governmental system in turning questions over to the courts. On the whole, I think that what we have done has been wise, and that the courts have handled very well the difficult problems which have been presented to them. But, we should not think of courts as our chief governmental agency. And we cannot operate, in my opinion, under a government where all questions are turned over to the courts." (*Hearings*, p. 496.)

To permit federal taxpayers' suits would, as Professor Davis indicates, mean that every action of the legislative and executive branches of the government would be subject to judicial review. It would involve a greater intrusion of the judiciary into the other branches of government than the advisory role rejected by the Supreme Court in Washington's day; for the courts would render opinions not merely at the behest of the President but of any taxpayer.

Nor is it true, as Professor Davis seems to think, that every provision in the Constitution is judicially enforceable but for the *Frothingham* doctrine. Such provisions as the "Republican form of government" clause (Article IV, Section 4) and the provision for extradition from one State to another (Article IV, Section 2) have never been judi-

cially enforceable. We agree with Dean Griswold that the present compromise practice, under which some but not all actions of the Executive and the Congress are subject to judicial scrutiny and some but not all provisions of the Constitution are judicially enforceable, is pragmatically sound though not theoretically neat. We do not believe that it is desirable now any more than in the days of *Scott v. Sandford*, 60 U.S. (19 How.) 393, that the Court undertake to pronounce upon the legality of every action of the other branches of the government.

It is of course true that this Court is now firmly committed to a broad interpretation of the general welfare clause. However, there can be no guarantee that some local judges would not enjoin, as not for the general welfare, federal programs which were acutely unpopular in their particular communities.

Overruling *Frothingham v. Mellon* would, moreover, open up for litigation a vast range of other issues which may not be appropriate for judicial determination. Thus the courts have dismissed under *Frothingham* suits to enjoin nuclear testing on the grounds, among others, that testing violated freedom of the seas and the United Nations Trusteeship Agreement covering the north Pacific islands. *Pauling v. McElroy*, 278 F. 2d 252, 107 U.S. App. D.C. 372, *cert. denied*, 364 U.S. 835; *Pauling v. McNamara*, 331 F. 2d 796, 118 U.S. App. D.C. 50, *cert. denied*, 377 U.S. 933.

We further agree with Dean Griswold (*Hearings*, pp. 496-497) that federal taxpayers' suits could seriously burden both the federal courts and the federal departments and agencies called on to defend them. It is argued in answer that state taxpayers' suits are entertained in most jurisdictions and have not resulted in a flood of litigation. However, there are much stronger incentives for test suits against the Federal Government than against the States or

localities, and the existence of innumerable organizations dedicated to innumerable causes makes it certain that the overruling of *Frothingham* would result in a plethora of suits. Witness the number of organizations filing briefs in this Court in this case.

II

NO SPECIAL CONSIDERATIONS OBTAIN AS TO THE ESTABLISHMENT OF RELIGION CLAUSE

It is argued that the Court could overrule *Frothingham* as to suits under the establishment of religion clause without overturning it generally, and that there is particular need to permit taxpayers' suits under the establishment clause because violation of that clause will peculiarly take the form of disbursements not open to challenge except by taxpayers' suits.

We are quite at a loss as to how taxpayers can have technical standing to sue to vindicate rights asserted under one clause of the Constitution but not under another, or as to how, if that be the basis of *Frothingham*, a federal taxpayer's suit challenging a disbursement can present a case or controversy if the disbursement is claimed to violate one clause of the Constitution but not if it is claimed to violate another.

Leading academic critics of *Frothingham* do not perceive any such basis of distinction, either in law or in policy.

Thus, Professor Davis has declared:

"The repeated idea that the law of standing should be changed to allow a challenge under a specified provision of the Constitution but not under other provisions of the Constitution and not for other kinds of illegality seems to me clearly unsound. A party who has standing to challenge for one kind of illegality that adverse-

ly affects him should logically have standing to challenge for another kind of illegality that adversely affects him to the same extent. The judicial doors should not be opened to a party in particular circumstances to challenge governmental action under the first amendment and at the same time closed to the same party in the same circumstances to challenge the governmental action under some other provision of the Constitution or under some statutory provision." (*Hearings*, *op. cite supra* Note 2. p. 495.)

Professor Kauper of the University of Michigan Law School took substantially the same position. *Hearings*, pp. 507-508.

Actually under *Frothingham* there is much greater opportunity for the consideration by this Court of cases concerning the establishment of religion clause than of cases involving the general welfare clause. That is because most States do entertain state taxpayers' suits and this Court, as pointed out in *Frothingham*, can review state taxpayers' suits which involve issues under the federal Constitution. There have in recent years been numerous state court decisions interpreting the establishment of religion clause which this Court could have reviewed had it seen fit.¹⁰

There is nothing to the argument that under *Frothingham* the establishment of religion clause is peculiarly insulated from interpretation by this Court.

We likewise submit that it is undesirable as a matter of policy to permit federal taxpayers' suits, even if restricted

¹⁰ *Horace Mason League of the U.S., Inc. v. Maryland Board of Public Works*, 242 Md. 645, 220 A. 2d 51, cert. denied and appeal dismissed, 385 U.S. 97; *Dickman v. School District No. 62C*, 232 Ore. 238, 366 P. 2d 533, cert. denied, 371 U.S. 823; *Swart v. South Burlington Town School District*, 122 Vt. 177, 167 A. 2d 514, cert. denied, 366 U.S. 925; *General Finance Corp. v. Archello*, 93 R.I. 392, 176 A. 2d 73, appeal dismissed, 369 U.S. 423; *Lundberg v. Alameda County*, 46 Cal. 2d 644, 298 P. 2d 1, appeal dismissed, 352 U.S. 921.

to claimed violations of the establishment of religion clause. Obviously that would not result in as much litigation or in as wide ranging litigation as an overruling of *Frothingham* in toto. Nevertheless taxpayers' suits, even though confined to the establishment clause, could result in challenges to a long list of major federal programs.

S. 3, the proposed legislation discussed *supra* p. 4 authorizes suits to challenge loans and grants under nine enumerated statutes.¹¹ A witness supporting the bill pointed out, however, that there are numerous other "programs that involve Federal loan and grant authorizations to nonprofit, private organizations related to religious groups." He submitted a list of 52 such programs. *Hearings*, pp. 111-122. The list is broken down into general categories, i.e., housing; food service (such as the national school lunch program); vocational rehabilitation; Older Americans Act programs; welfare administration; public health programs; migrant programs; food for peace; international development programs; arts and humanities; economic development; education programs; and economic opportunity programs. One of the programs listed is, appropriately enough, the grants for maternal health which were the target in *Frothingham*.

The Department of Health, Education and Welfare likewise submitted a tabulation of "Federal Programs under Which Institutions with Religious Affiliation Receive Fed-

¹¹ I.e., (1) the Higher Education Facilities Act of 1963, (2) title VII of the Public Health Service Act, (3) the National Defense Education Act of 1958, (4) the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, (5) title II of the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), (6) the Elementary and Secondary Education Act of 1965, (7) the Cooperative Research Act, (8) the Higher Education Act of 1965, and (9) the Economic Opportunity Act of 1964.

eral Funds Through Grants or Loans." *Hearings*, pp. 367-378. This list includes numerous programs not included in the other listings. These programs include not only the whole range of Health, Education and Welfare, but programs administered by the Atomic Energy Commission, the Veterans' Administration, the National Science Foundation, the State Department, the Department of Defense, the Department of Agriculture, the National Aeronautics and Space Administration, and the Department of the Interior.

These listings of loan and grant programs do not, incidentally, include many disbursements which might be challenged by imaginative litigants, such as, for example the salaries of chaplains of Congress and the armed forces;¹² the erection and display of religious symbols, such as creches, on public property;¹³ the cost of engraving "In God We Trust" on coins and bills, etc.

It is thus apparent that an overruling of *Frothingham*, even if confined to suits under the establishment clause, would result in many of the disadvantages, as we see it, of a blanket sanctioning of taxpayers' suits.

¹² *Elliott v. White*, 23 F. 2d 997, 57 App. D.C. 389, dismissed under *Frothingham*.

¹³ A news story in the N.Y. Times, November 29, 1967, p. 20, reads in part as follows:

"The Clergy Association of Union [New Jersey] filed a protest Monday with Mayor F. Edward Biertuempfel on the erection of a Nativity scene on the lawn of the Municipal Building.

• • • • •

"The protest, in the form of a letter signed by the Rev. E. James Robert, president of the Protestant association and pastor of the Union Methodist Church, said the objections to the creche center on "the question of the propriety, if not the legality, of the site in front of the seat of local government."

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief for the Government, the judgment of the court below should be affirmed.

Respectfully submitted,

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December, 1967

APPENDIX A**COURT CHALLENGES TO FEDERAL EXPENDITURES
AFL-CIO RESOLUTION NO. 216**

A back-door attack on federal aid to education, civil rights, the war on poverty and many related programs has been launched in Congress and there is a serious danger that it could succeed.

The threat is in the form of a bill, S-3, which has already passed the Senate and is now being considered by a committee of the House of Representatives.

This bill would empower anyone to challenge, through a suit in federal district court, the validity under the First Amendment of any loan or grant under nine specified statutes. The nine are:

- 1—The Higher Education Facilities Act of 1963,
- 2—Title VII of the Public Health Service Act,
- 3—The National Defense Education Act of 1958,
- 4—The Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963,
- 5—Title II of the Act of September 30, 1950 (Public Law 874, Eighty-First Congress), identical with Title I of No. 6 below;
- 6—The Elementary and Secondary Education Act of 1965,
- 7—The Cooperative Research Act,
- 8—The Higher Education Act of 1965, and
- 9—The Economic Opportunity Act of 1964.

The bill is unsound in principle and could well be disastrous in practice. It is unsound in principle because it would provide judicial review of matters which throughout the nation's history have been the province of the Congress and the Executive Department.

It could be disastrous in practice because it would be within the power of hostile courts to harass and hamstring the administration of federal programs with which they were not in sympathy.

This could be done prior to any hearing and without notice; for S-3 would allow federal district courts to issue interlocutory injunctions against "the payment of a grant or loan, or any portion thereof . . . at any stage of the proceedings." Thus even if a suit were ultimately lost, the target program could be suspended throughout the entire judicial procedure. A greater opportunity for sheer obstructionism could hardly be devised.

One source of support for this measure derives from well-intentioned Americans who believe that the very limited participation of church-supported schools in the Elementary and Secondary Education Act of 1965 violates the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion." Some contend this forbids expenditure of public funds for schools established by religious groups, even though they conform to public school standards and federal funds are not used for teaching religious subjects.

It was this issue that for so many years delayed any federal aid to primary and secondary schools, even though the urgent need for such aid was widely recognized. Finally, in 1965, a compromise was worked out in the Congress providing federal aid for certain specific purposes to students in private as well as public schools. On that basis, federal aid at last became a reality.

As early as 1963 the AFL-CIO Convention had adopted this position as a means of "resolving the bitter controversy that has so far blocked efforts to enact substantial federal aid for education." This is still our position.

Some of those who are backing S-3 sincerely feel that even peripheral public benefits to pupils in church schools, such as books and busses, run contrary to the First Amendment. As expressed in S-3, the possibility of challenge extends beyond the primary and secondary schools to church-connected colleges and universities as well, even though the latter have been receiving federal aid for more than a century. We respect the convictions of the sincere supporters of S-3 though we disagree with them. However, we believe their sincerity is being exploited by others with baser motives.

There are southern members of Congress, once supporters of federal aid to education, who now are opposed to it on the grounds that it promotes school integration. They hope the program will founder in a flood of taxpayer suits on the religious issue. There are other Congressmen who never favored federal aid but feared to oppose the compromise plan. If taxpayer suits should succeed in invalidating any form of assistance to church-established schools, they would happily revert to total opposition.

Similar considerations apply to the health and poverty programs, except that in these the racial factor is uppermost. Segregationists are taking advantage of the religious issue in education to open the way to attacks on all undertakings that aid any minority group.

Such attacks, regardless of merit, should be pressed and decided in the forum where the will of the people is most clearly represented—on the floor of the Congress. The courts cannot and should not be permitted to exercise powers that belong to the legislative branch.

S-3 opens the gates to special taxpayers suits against expenditures authorized under the terms of a law that in general cannot be challenged. The United States Supreme

Court long ago ruled that federal taxpayers cannot litigate the legality of federal disbursements. We believe this is a wise position. But under S-3 the courts would be thrust into the legislative and administrative functions of government to a degree never imagined by those who conceived the division of powers. It is ironical that many who support S-3 were among the most rancorous critics of "court interference" in the constitutional questions of school segregation and the principle of one man, one vote.

Judicial intervention of the kind authorized by S-3 would disrupt the orderly functions of a government in general and in particular, could destroy the effectiveness of the education, health and general welfare programs now in being. Therefore, be it

RESOLVED: The AFL-CIO is inalterably opposed to S-3 and any other similar measure.

FILED

DEC 29 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HANKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

Appellants,

v.

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States,
and HAROLD HOWE, 2d, as Commissioner of Education
of the United States,

Appellees.

On Appeal from the United States District Court for
the Southern District of New York

**BRIEF OF AMERICANS FOR PUBLIC SCHOOLS,
AND
BAPTIST GENERAL ASSOCIATION OF VIRGINIA**

SAM J. ERVIN, JR.
Box 69
Morganton, N. C.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HANKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

Appellants,

v.

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States,
and HAROLD HOWE, 2d, as Commissioner of Education
of the United States,

Appellees.

On Appeal from the United States District Court for
the Southern District of New York

BRIEF OF AMERICANS FOR PUBLIC SCHOOLS,
AND
BAPTIST GENERAL ASSOCIATION OF VIRGINIA

INTEREST OF THE AMICI CURIAE

The Baptist General Association of Virginia is an association of approximately 1,450 Baptist churches in the

State of Virginia whose congregations number over 500,000 members. The Baptists of Virginia have long been concerned with the constitutional issue of the separation of church and state. They were instrumental in securing the enactment in 1786 of Virginia's Bill for Establishing Religious Freedom, which this Court has recognized as the progenitor of the religious clauses of the First Amendment to the United States Constitution. At present, the Baptists of Virginia operate four colleges and three secondary schools, creating a vital interest in the question of whether taxpayer monies can be used to support sectarian schools under the First Amendment.

The Americans for Public Schools are concerned that federal aid to sectarian schools deprives the public schools of America of urgently needed funds. They have dedicated themselves to the preservation and strengthening of public education. One of the major responsibilities of government is to provide excellent, free education for its citizens. This responsibility cannot be met if public funds are diverted to privately operated schools and the public schools must compete for the limited resources available.

Permission is granted by both parties for the filing of this brief.

STATUTE INVOLVED

The statutory provisions involved in this suit are Titles I and II of the Elementary and Secondary Education Act of 1965 (Public Law 874, Eighty-First Congress).

THE QUESTION PRESENTED FOR REVIEW

This appeal presents the following question: Do citizens and taxpayers of the United States have standing to challenge in the Federal courts an expenditure of Federal funds on the ground that such expenditure is in violation

of the Establishment and Free Exercise provisions of the First Amendment to the United States Constitution?

STATEMENT OF THE CASE

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the City and State of New York, challenging the constitutionality under the First Amendment of certain expenditures made by the Department of Health, Education and Welfare. The complaint alleges that these expenditures, purportedly made pursuant to the authority of the Elementary and Secondary Education Act of 1965, were made to finance the furnishing of instruction and the providing of instructional materials for use in religious and sectarian schools. The plaintiffs requested judgment declaring these expenditures to be unconstitutional and enjoining further expenditures for these purposes. No request was made for judgment requiring restitution for funds already expended or which will have been expended before issuance of the injunction sought in the action.

The District Court dismissed the complaint on the ground that the action was controlled by the principles laid down in the case of *Frothingham v. Mellon*, 262 U.S. 447 (1923), that under these principles the plaintiffs had no standing to bring the action, that there was no justiciable controversy, and that the court therefore lacked jurisdiction of the subject matter. The court rejected the plaintiffs' contentions that *Frothingham* was not based upon absence of constitutional jurisdiction but upon judicial policy and that the policy considerations which required dismissal in *Frothingham* were inapplicable to a suit based upon the First Amendment. Although conceding that *Frothingham* has been the subject of criticism, the court held that since it had never been overruled or limited by this Court, the court below could not or would not overrule it on its own motion.

SUMMARY OF ARGUMENT

In spite of the interest that they as citizens have in maintaining the absolute "wall of separation" (*Reynolds v. United States*, 98 U.S. 145, 164 (1878)), it is alleged that plaintiffs in this case have not demonstrated that they possess the requisite standing necessary to bring the present suit. For this proposition, appellees rely upon the case of *Frothingham v. Mellon*, 262 U.S. 447 (1923). In that case, a federal taxpayer sought to enjoin administration of the Maternity Act of 1921, which provided for the appropriation of federal funds to combat maternal and infant mortality, on the basis that by enacting the statute Congress had exceeded its delegated powers and usurped powers reserved to the states by the Tenth Amendment to the Constitution. The plaintiff contended that the effect of the appropriation would be "to increase the burden of future taxation and thereby take her property without due process of law." *Id.* at 486. The Supreme Court held in that case that the taxpayer could not maintain the suit, stating in part as follows:

... The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. . . . But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, or any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity. . . .

... We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. . . . That question may be considered

only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . . *Id.* at 486-488.

We submit that the *Frothingham* case is not dispositive of the issue of standing in this case for several reasons: (1) It does not govern cases alleging encroachments upon First Amendment freedoms, especially cases bottomed on the Establishment Clause; (2) if governing, plaintiffs satisfy the standards set forth in that case; and (3) even if they fail to satisfy these tests, there are important reasons requiring that the Court nonetheless confer standing in this case.

ARGUMENT

I. The Nature of the Injury Caused by Infringement of the Rights of Citizens Under the Establishment Clause is Sufficient to Confer Standing.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." As its preeminent location in the Bill of Rights indicates, and as this Court has repeatedly held, all of "the great liberties insured by the First Article" occupy "a preferred position in our basic scheme." *Prince v. Massachusetts*, 321 U.S.

158, 164 (1944). Mr. Justice Jackson explained that "this freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity." *Everson v. Board of Education*, 330 U.S. 1, 26 (1947) (Jackson, J., dissenting), quoted with approval in *Abington School District v. Schempp*, 374 U.S. 203, 216 (1963).

This Court has repeatedly declared that the provisions of the First Amendment, and in particular those of the Establishment Clause, are absolute and without qualification. In *Everson, supra* at 15-16, the Court said: "The 'establishment of religion' clause means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. . . ." Accord: *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210-211 (1948); *McGowan v. Maryland*, 366 U.S. 420, 442-443 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 492-493 (1961); *Abington School District v. Schempp, supra* at 216-217. Furthermore, this Court has explained that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. . . . When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*

v. *Vitale*, 370 U.S. 421, 430-431 (1962); *Accord: Abington School District v. Schempp*, *supra* at 221. Thus, "the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense." *Everson*, *supra* at 26 (Jackson, J., dissenting), quoted with approval in *Abington School District v. Schempp*, *supra* at 216. "Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent, and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' Memorial and Remonstrance Against Religious Assessments, quoted in *Everson*, *supra* at 65." *Abington School District v. Schempp*, *supra* at 225.

These excerpts show the Court's appreciation of the fact that every breach in the "wall of separation" dividing Church and State, however indirect or quantitatively small, is nonetheless a dangerous encroachment on the fundamental and important individual freedoms sought to be protected by the First Amendment. The Establishment Clause was adopted as a means of protecting the citizen from the dangers which, as history convinced the authors and has confirmed since, inevitably flow from an alliance of the two. Although the enforced separation also protects both parties from the consequences of mutual involvement in each others' affairs, these benefits are only incidental. The primary purpose of the Establishment Clause is to protect the individual, in whose name these associations are inevitably made. The injury done by encroachment upon the principle is, therefore, to every citizen and to all citizens. It is a diminution of the citizen's freedom, and appropriate reason for him to seek redress in this Court.

The nature of the rights protected by the Establishment Clause is such that the injury caused the citizen by their erosion cannot be comprehended in monetary terms. As Judge Frankel pointed out below, the injury is no less real because it "is not merely, or mainly, economic loss. And the roles in which plaintiffs allege injury are not simply their roles as taxpayers. When the Founders proscribed laws 'respecting an establishment of religion', their aim, as Madison described it, was to make it impossible 'to force a citizen to contribute three pence only of his property for the support of any one [church] establishment * * *' Memorial and Remonstrance Against Religious Assessments, quoted in *Everson v. Board of Education*, 330 U.S. 1, 63-66 (1947) (Appendix to dissent of Rutledge, J.). It is banal but relevant to say that the concern was not over the three pence. The concern was with a specially cherished form of spiritual and intellectual freedom. . . ." *Flast v. Gardner*, 267 F. Supp. 351, 355 (S.D.N.Y., 1967).

Thus, as Judge Frankel suggested, an economic analysis of the plaintiff's interest is inappropriate in a case of this kind. *Ibid.* The proper analysis must comprehend the nature of the rights confirmed by the Establishment Clause, and the identity of the party upon whom these rights are conferred. When, through the action of government, these rights are diminished, the citizen is injured, and must be able to seek redress for that injury in court. The plaintiffs in this case, as citizens, contend that the Elementary and Secondary Education Act infringes the rights conferred upon them by the First Amendment. Their status as injured citizens, and nothing else, gives them the requisite interest to maintain their suit.

This Court stated the test of standing in *Baker v. Carr*, 369 U.S. 186 (1962) as follows: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharp-

ens the presentation of issues upon which the Court so largely depends for illumination of difficult questions?" *Id.* at 204. In that case, appellants were challenging the validity of a Tennessee statute apportioning the members of that State's General Assembly on the grounds that it debased their votes and thereby denied them equal protection of the laws. The Court declared that plaintiffs were asserting "'a plain, direct and adequate interest in maintaining the effectiveness of their votes' . . . not merely a claim of 'the right, possessed by every citizen, to require that the government be administered according to law. . . .'" "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Id.* at 208.

The plaintiffs in this case have clearly suffered an injury if their rights under the First Amendment have been encroached upon, regardless of their status as taxpayers. And that injury is surely one which they have a "plain, direct and adequate interest" in preventing (*Baker v. Carr*, *supra*), if only because "it is proper to take alarm at the first experiment on our liberties." *Everson*, *supra* at 65. In neither case can the injury be measured in any quantitative fashion, financial or otherwise. The injury in both cases is personal to plaintiffs as citizens and is measured properly only by the quality of the wrong they have suffered.

The fact that they share this injury in common with other citizens should not bar their suit. As Professor Jaffe has pointed out, "it begins to be paradoxical to argue that because an allegedly unconstitutional law affects all the citizenry rather than only someone here and there, the Court is without jurisdiction." Jaffe, "Standing in Public Actions," 74 Harv. L. Rev. 1265, 1310 (1961). Here, as in *Baker v. Carr* where plaintiffs also suffered

an injury in common with everyone else affected by the statute, plaintiffs should be held to have sufficient standing to protect their constitutional rights regardless of their monetary stake in the outcome of the suit, and regardless of the fact that the wrong was also done to other citizens. To rule otherwise is to declare that this Court will only consider petty infringements of the First Amendment affecting small groups of persons, but will not consider a general attack affecting all citizens. Indeed, it is to say that the Court is powerless to interpose itself against a grand alliance of Church and State to the detriment of all, and is reduced merely to the role of obstructing joint ventures of limited purpose and narrow impact.

The case of *Engel v. Vitale*, *supra*, furnishes further support for the view that standing should not depend on financial injury in a case of this kind. In that case, parents of school children challenged a New York law directing a school principal to have a 22 word prayer read aloud in class as an encroachment upon the Establishment Clause. Students who wished to do so could remain silent or be excused during the recitation. The Court recognized that there was no "direct governmental compulsion" shown, but held that "[t]he Establishment Clause . . . is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." 370 U.S. at 430. As Professor Sutherland has noted, "the Court's opinion seems to find that the available permission for the child to withdraw, or not to take part in the exercise, has shielded the child from cognizable hardship. Has the parent, despite this, suffered some justifiable wrong *qua* parent? How is the parent any more wronged than his childless but religiously strong-minded neighbor across the street?" Sutherland, "Establishment According to Engel," 76 Harv. L. Rev. 25, 42 (1962). Yet the Court did not question the parents' standing to sue in that case.

See also *Abington School District v. Schempp*, *supra* at 224, n.9; *Zorach v. Claiborn*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).

The injury suffered by reason of a breach of the Establishment Clause is necessarily indirect, and somewhat indefinable, as was that of the parent in *Engel*, *supra*. But the interest of the citizen surely is no more indirect or immeasurable than that of the parent. Thus, we submit that Mr. Justice Brennan was partially correct when he stated that "... it might seem illogical to confer standing upon a parent who . . . suffers no financial injury, by reason of being a parent, different from that of an ordinary taxpayer, whose standing may be open to question. . . ." *Abington School District v. Schempp*, *supra* at 267, n. 30 (Brennan, J., concurring). However, the illogic is not in the conferral of standing upon the parent but in the fact that there should be any doubt about a citizen's or taxpayer's standing. The citizen's interest in maintaining the "wall of separation" between Church and State is equally great and equally compelling. The answer to the paradox described by Justice Brennan and Professor Sutherland is that the parent in *Engel* suffered no injury under the Establishment Clause different from his religiously strong-minded neighbor. The plaintiff in *Engel* had standing as a citizen who was coincidentally also a parent.

II. If the Test of Economic Interest Laid Down by *Frothingham* Governs this Case, Then Plaintiffs Have Standing as Federal Taxpayers.

A. *Frothingham* did not hold that a suit by a federal taxpayer could never rise to the level of a case or controversy.

Several aspects of the Court's decision in the case of *Frothingham v. Mellon* compel the conclusion that the

Court did not hold that there is a constitutional barrier to the maintenance of a suit by a Federal taxpayer. The first, and most obvious, is that the Court did not say that there was such a barrier, whereas in the companion case of *Massachusetts v. Mellon*, the Court specifically stated that "the complaint of the plaintiff State . . . is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power". 262 U.S. at 483.

The Court in *Frothingham* spelled out several other reasons for its decision, all of which indicate that the decision was an exercise of the Court's discretion, and not of obligation under the Constitution. It pointed out that the plaintiff shared her interest in common with millions of other taxpayers, that her particular interest was "comparatively minute and indeterminable", and that the effect on future taxation or payment out of the funds was "remote, fluctuating and uncertain". *Id.* at 487. Thus, the Court's holding that "no basis is afforded for an appeal to the preventive powers of a court of equity" (*ibid.*) is no more than a statement of the familiar principle that a plaintiff, when appealing to the Court's traditionally discretionary equitable powers, must show irreparable harm which can not be remedied by resort to a court of law. Mrs. Frothingham did not show such harm.

It should also be observed that Mrs. Frothingham's claim that her property was taken in violation of the Fifth Amendment was based upon an alleged abuse of the federal principle expressed in the Tenth Amendment. The gravamen of her action being a violation of the division of powers between the States and the Federal Government, it was proper for the Court to regard her litigable interest in this matter as deficient. Questions such as these not being justiciable (*Mellon*), the slight economic

burden she suffered was inadequate to move the Court into the political arena.

Such restraint is required when political objections to social legislation are recast in legal terms and the controversy is taken to the courts for resolution. But judicial reluctance to hear the claim of a federal taxpayer is misplaced when it is employed to reject a petition alleging the improper use of one's tax monies for the aid of religion. Indeed, it may be more than merely misplaced. The constitutional history of the First Amendment shows the concern of Madison and Jefferson over the use of the taxing power for the benefit of religion. This history strongly suggests that the Court is constitutionally obligated to hear this taxpayer's complaint.

That *Frothingham* at most expresses a policy of judicial restraint is reinforced by the Court's assertion of jurisdiction in *Everson, supra*. For, as this Court pointed out in *Doremus v. Board of Education*, 342 U.S. 429 (1952), citing *Frothingham*, "what the Court said of a federal statute [is] equally true when a state Act is assailed. . . . [B]ecause our jurisdiction is cast in terms of 'case or controversy', we cannot accept as a basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such". *Id.* at 434. Having adopted the same test for state as well as federal cases, the Court's failure to question *Everson's* standing can only mean that *Frothingham* is no constitutional barrier to state taxpayers seeking to challenge expenditures violative of the First Amendment. The fact that *Everson* paid his taxes to the district and not to the federal treasury is not a difference sufficient to rise to the dignity of a constitutional distinction. At most, the issue is whether plaintiffs, as federal taxpayers, have shown an interest in their case at least as strong as *Everson* did in his—one that warrants asking the Court to exercise its equitable powers.

B. Plaintiffs show sufficient interest in this case to satisfy the Frothingham test.

In *Doremus v. Board of Education, supra*, plaintiff taxpayers, challenging Bible reading in the public schools, did not allege any pecuniary interest in order to maintain standing. The Court held that he did not have standing. The Court stated, however, that "Everson showed a measurable appropriation or disbursement of . . . funds". *Doremus v. Board of Education, supra* at 434. Everson's monetary injury was an indeterminable part of the \$357.74 expended for transporting children to parochial school. The personal expense to Everson was therefore undetermined and negligible. In this case also, plaintiff taxpayers are alleging a "measurable appropriation or disbursement of . . . funds". Plaintiffs' injury is an indeterminate part of the billions of dollars expended and to be expended under the challenged program. While the dollar amount going to church-related recipients may not yet be determined, it certainly is not negligible. And the personal cost to plaintiffs may not, in the long haul, be negligible either.

It would be arbitrary to permit Everson to sue as a district taxpayer under the facts of that case, and yet reject plaintiffs' standing here merely because they are federal rather than state taxpayers. *Frothingham* attempted to draw such a distinction, stating that "the interest of a taxpayer of a municipality in the application of its money is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate" because of "the peculiar relation of the corporate taxpayer to the corporation". The distinction, if ever valid, no longer is in today's complicated society. What the Court then said about federal taxpayers is now equally true of state and local taxpayers. The relationship of a taxpayer to his state or city government no longer has "some resemblance to that subsisting between stockholder

and private corporation" (*Frothingham*, *supra* at 486). Rather, state and local taxpayers today also have an "interest in the moneys of the [state and local treasuries]—partly realized from taxation and partly from other sources—[which] is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds . . . [is] remote, fluctuating and uncertain . . ." (*Ibid.*). Furthermore, as Professor Davis pointed out in testimony before The Subcommittee on Constitutional Rights of the Senate Judiciary Committee (Hearings on S. 2097, 89th Cong. 2d Sess., p. 493):

The Court [in *Frothingham*] said that the effect of a Federal expenditure on a Federal Taxpayer was "comparatively minute and indeterminable." That was true as of 1923. But it is not true as of 1966. Taxes that almost any corporation pays to the Federal Government are no longer "comparatively minute" as against taxes the same corporation pays to municipalities. . . . The tax facts on which the *Frothingham* opinion was based have now turned right around backwards. . . . Because the rule of the Supreme Court since 1879 has been and still is that a municipal taxpayer has standing, and because that rule is clearly sound, a Federal taxpayer should now *a fortiori* have standing.

Thus, viewed in terms of the tests laid down by *Frothingham*, and as applied in prior cases, these plaintiffs as federal taxpayers stand in no worse light than have other litigants who have relied upon their contributions to local treasuries as the measure of their claim to maintain their case. Accordingly, they meet the criteria governing standing which were outlined in *Frothingham* and should be heard here.

III. The Magnitude of the Issue Presented in The Suit is Sufficient to Confer Standing on the Plaintiffs Even if They Fail to Meet the *Frothingham* Test.

The issue presented by this case is precisely that which it is the function of the Court to decide. The controversy is mature, the parties are antagonistic, the question is justiciable in the ordinary sense, and the relief prayed for does not threaten to involve the Court in duties alien to its processes. Cf. *Baker v. Carr*, *supra*. No judicial doctrine of abstention or constitutional principle governing litigation is involved other than the question of standing.

As noted by Justice Brennan, "the concept of standing is necessarily a flexible one" (*Abington School District v. Schempp*, 374 U.S. at 267, n. 30 (Brennan, J., concurring)). Where, as here, plaintiffs have "very real grievances . . . which cannot be resolved short of constitutional adjudication" (*ibid.*), this Court should confer standing whether or not the plaintiffs meet the conventional tests. They present "weighty countervailing policies here to cause an exception to our general principles". *McGowan v. Maryland*, 366 U.S. 420, 430 (1961). See also *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court held that a private corporation devoted to secular and religious education had standing to challenge the constitutionality of the Oregon Compulsory Education Act which required that parents send their children to public elementary schools. The Court readily conceded that the corporation could not claim for itself "the liberty which the 14th Amendment guarantees." *Id.* at 535. However, it went on to note that the corporation's business and property were "threatened with destruction through the unwarranted compulsion which [Oregon was] exercising over prospective patrons of their schools", and that "this Court has gone very far to protect against loss threatened by

such actions". The Court accepted jurisdiction over the case despite the alleged defect in the plaintiffs' standing.

The Court in *Pierce* was moved to accept the suit, not so much because the claim of injury was so importunate, but rather because the financial injury that was threatened stemmed from a clear violation of the Free Exercise Clause. So blatant was the violation that the Court waived its ordinary rules and, in effect, permitted the Society standing *in loco parentis* of the children, whose right to pursue a religious education was infringed. The interest of the plaintiffs in this case is more important than the corporate health of the Society, and certainly more direct. The Court should go just as far to protect this interest even if, as it did in *Pierce*, it must ignore some of the technical requirements of standing in order to do so.

The magnitude of the issues raised in this suit completely overshadows the technical rules of standing set forth in *Frothingham*. The principle expressed in the Establishment Clause, and as restated by this Court in every pertinent case, is of the first order of importance. The historical events which led to the incorporation of this principle in the Constitution demonstrate the danger posed by the association of government in church affairs, and of the church in government. The experience of the past demonstrates the possible results when governmental power is exerted to tax citizens for the benefit of religion. The modern experience of other societies, and suggestions now being raised in our own, illustrate the threat to public education which may result from mutual involvement unchecked by judicial review. The spectre raised by this Court, that "[t]he breach of neutralism that is today a trickling stream may all too soon become a raging torrent", will be all too real if the Court decides against these plaintiffs.

The Court should recognize the possible consequences of a decision which denies standing to citizen-taxpayers

to challenge federal appropriations deemed to contravene the Establishment Clause. There are no other potential litigants who may raise this issue adequately before the Court. While nimble imagination may devise a set of circumstances in which a public institution, denied what it considers its full share, might complain that a church-related school received federal funds in violation of the First Amendment, or one in which a public official defends his refusal to carry out the dictates of the statute on the grounds that to do so would be unconstitutional, as a practical matter these speculations are not likely to be realized. As citizens and taxpayers, these plaintiffs are probably the only type of litigants who can present this type of controversy before the Court and, because they present the constitutional controversy in its clearest and sharpest guise, they are the best possible litigants that may be expected.

Finally, it should be recognized that the result of holding that this class of plaintiffs has no standing would be to reduce the Establishment Clause to a minor rule of law governing errant States. The Clause henceforth would have vitality only against State legislatures, although it is applied to them indirectly through the 14th Amendment, and then only since 1940. The principle would no longer serve as an effective restraint upon Congress, despite the words of the provision and its original intent. On religion and the First Amendment, the law of the land would be less majestic than ironic.

In short, because the consequences of failing to permit this type of plaintiff to maintain this suit are so inimical to the constitutional principle involved, the situation warrants the conferring of standing as an extraordinary grant. This the Court has done before, even at the expense of weightier obstacles than those presented by *Frothingham*. E.g., compare *Baker v. Carr*, *supra*, with *Colegrove v. Green*, 328 U.S. 549 (1946).

The history of congressional stalemate on legislation authorizing judicial review highlights the need for Court action. For the past five years the Senate has overwhelmingly approved legislation to overrule the *Frothingham* case as respects First Amendment suits. These attempts, reflecting Senate conviction that the case expresses merely a doctrine of restraint which is inappropriate in the area of the First Amendment, have consistently come to naught because of resistance by the House of Representatives. The most recent example occurred on December 1, 1967, when a judicial provision was added on the Senate floor to the 1967 Amendments to the Elementary and Secondary Education Act. (Title VIII, H.R. 7819, 90th Cong. 1st Sess.; 113 *Cong. Rec.* S17699 (daily ed. Dec. 1, 1967)). The provision was deleted in conference at the insistence of the House. A similar amendment was deleted in 1963 from the Higher Education Facilities Act, and in 1966 and 1967, the House also refused to consider Senate-passed judicial review legislation.

The inability of Congress to overrule the *Frothingham* precedent means that, as a practical matter, the only foreseeable opportunity for judicial consideration of the First Amendment questions in federal aid to church-related schools lies before the Court in this case. The legislative action was initiated because of the previous reluctance of this Court to reverse or clarify its own rule of decision. The failure to enact repealing legislation means that the obligation once again is placed solely on this Court.

CONCLUSION

For the reasons stated above, and for the reasons submitted by appellants, the Court should reverse the decision of the court below and remand the case for trial on the merits.

Respectfully submitted,

SAM J. ERVIN, JR.
Attorney for Amici

December 1967

No. 211

In the Supreme Court of the United States

October Term, 1907

FLORENCE FLANN, et al., Appellants,

**JOHN W. GARDNER, as SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, et al.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

WRIT FOR HABEAS CORPUS

DAVID S. GREENFIELD,

JOHN J. WHELAN,

WILLIAM J. BROWN,

ALFRED J. BROWN,

JOHN J. WHELAN,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ET AL., APPELLANTS

v.

JOHN W. GARDNER, AS SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the three-judge district court (J.A. 21a) is reported at 271 F. Supp. 1. The prior opinion of the single district judge, granting the motion for the convening of a three-judge court (J.A. 13a), is reported at 267 F. Supp. 351.

JURISDICTION

The judgment of the district court dismissing the complaint (J.A. 3a) was entered on June 19, 1967. A notice of appeal was filed on June 26, 1967 (J.A. 3a). On October 16, 1967, this Court noted probable jurisdiction, 389 U.S. 895.

(1)

The jurisdiction of this Court is invoked under 28 U.S.C. 1253. There is, however, a serious question whether appellants' contentions were required to be heard by a district court composed of three judges, which is the predicate for direct review by this Court. We discuss the jurisdictional question in Point I, *infra*, pp. 9-21.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the Constitution of the United States:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution * * *.

The First Amendment to the Constitution of the United States provides in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.

The relevant provisions of Titles I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241a *et seq.*, (Supp. II, 1965-1966), are set forth in the Appendix to Appellants' Brief.

QUESTION PRESENTED

Whether appellants, as citizen-taxpayers, have standing, solely by virtue of that status, to enjoin federal officers from approving federal grants to State agencies which allegedly use the funds in violation of the First Amendment.

STATEMENT

Appellants are citizens who pay federal income taxes (J.A. 5a).¹ They brought this action against the appellees, the Secretary of Health, Education and Welfare, and the Commissioner of Education, alleging that in "approving any program for the expenditure of Federal funds to finance * * * instruction or guidance services in religious and sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools" (J.A. 10a) appellees were violating the Establishment and Free Exercise Clauses of the First Amendment (J.A. 9a).

The expenditures which appellants attack were made by State and local authorities out of federal grants to the States under Titles I and II of the Elementary and Secondary Education Act of 1965. Essentially, Title I authorizes federal grants to States for the use of their local educational agencies when the local agency presents an application which the appropriate State educational agency has determined meets the various criteria set forth in the Act. 20 U.S.C. 241e.² The local agency's plan must be designed "to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families." Each plan must meet various standards, including a demonstration (20 U.S.C. 241e(a)(2)):

¹ In addition, one appellant, Helen D. Henkin, has children attending the elementary or secondary grades in the public schools of New York. *Ibid.*

² All statutory citations are to Supplement II, 1965-1966, of the United States Code, unless otherwise indicated; all references to Title 45, C.F.R., are to the February 1967 revision, 32 Fed. Reg. 2742 *et seq.*

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * *

Title II authorizes federal grants to States which submit plans for the acquisition of library resources and other instructional materials for the use of children and teachers in public and private elementary and secondary schools. 20 U.S.C. 823. The place where the instructional materials will be provided for use by public and private school children is not a condition of plan-approval, and is thus not subject to control by appellees.

Section 805 of the Act, 20 U.S.C. 885, specifically provides that nothing in the Act may be construed to authorize any payments for religious worship or instruction. The Commissioner's regulations for administering Title II direct that the State plan must provide that federal funds "will not be used for religious worship or instruction, or for school library resources, textbooks, or materials to be used in such worship or instruction." 45 C.F.R. 117.4(c) (1967).

The complaint prayed that a three-judge court be convened "to declare unconstitutional the determination and action of the [appellees] * * *" (J.A. 9a), to "adjudge and declare that the determination and

action of the [appellees] * * * is not authorized or intended by the Elementary and Secondary Education Act of 1965, or in the alternative if such determination and action are within the authority and intent of the Act, the Act is to that extent unconstitutional and void", and to enjoin the appellees "from approving any program for the expenditure of Federal funds to finance in whole or in part instruction or guidance services in religious and sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." (J.A. 10a).

The parties assumed that the substantiality of the issues would make a three-judge court appropriate, but appellees moved to dismiss on the ground that appellants plainly lacked standing to bring this action. Deeming the standing question itself substantial, District Judge Frankel referred the case to a court of three judges, 267 F. Supp. 351. Over his dissent, the court thereupon dismissed the complaint on the ground that *Frothingham v. Mellon*, 262 U.S. 447, established that the status of citizen-taxpayer is not of itself sufficient to create standing to challenge federal expenditures, 271 F. Supp. 1. This appeal followed.

SUMMARY OF ARGUMENT

I

As the issues have been clarified by appellants' presentation, it appears that this case was not required to be heard by a three-judge court, and there-

fore a direct appeal to this Court is not authorized. Viewed in the light of appellants' own characterization, their suit is not designed to enjoin the operation of the Elementary and Secondary Education Act of 1965 on the ground of the Act's repugnance to the Constitution. Rather, conceding the Act's constitutionality in general, they challenge the implementation of certain types of programs established by the New York City Board of Education, contending that appellees are not authorized by the Act to approve grants which may be used to fund these projects. Only in the event that these local programs are held to be authorized by the Act do the appellants assail its validity, and then only with respect to the class of programs whose creation and implementation by the New York City Board of Education they oppose. Objection to the specifics of administering an Act whose substantial constitutionality is not challenged does not require the convening of a three-judge district court, as the plain language and the purposes of the three-judge court statute demonstrate.

II

If the Court finds it proper to reach the question tendered by this appeal, the action of the court below should be affirmed. The core of appellants' position is that, because this suit would, on the merits, presumably pose certain important questions of "preferred freedoms" under the First Amendment, they must therefore have standing to assert the claims. This argument turns on the erroneous assumption that the function of the federal judiciary is to decide all ques-

tions of constitutional interpretation that may arise in the course of governmental administration, irrespective of who seeks the guidance. Thus, appellants argue, the *Frothingham* rule should be brushed aside when it interferes with the discharge of that function. Article III, however, ordains that the federal courts must confine themselves to the disposition of cases and controversies. The power to decide questions of constitutional interpretation arises solely as an incident to the decision of cases and controversies, in that the court may render nugatory an unconstitutional enactment that would otherwise be dispositive of the rights of the parties.

The principle that a federal taxpayer *qua* taxpayer lacks standing to challenge specific expenditures of federal revenues is required by the case or controversy limitation of Article III. Without such a rule, as this case demonstrates, the federal courts would become in effect a council of revision, empowered to review virtually any act of Congress or the Executive upon the request of any of seventy million potential "plaintiffs." Such a conception is far removed from that of the founders, who regarded each Branch of the government as being under a co-equal obligation to interpret and apply the Constitution within that Branch's proper sphere of activity. The ultimate power of judicial review may be invoked only where executive or legislative action is relied on to sustain or preclude a litigant's assertion of a specific claim to relief. A judicial and justiciable question is not presented simply because a taxpayer disagrees with the uses to which tax money is put unless he can

show that the federal program has some specific and definable impact on his private rights.

III

If *Frothingham* is viewed as a rule of restraint rather than as a jurisdictional limitation, so that taxpayers' suits might in some cases be proper, we suggest that the circumstances here presented do not warrant such exceptional treatment. Under the Elementary and Secondary Education Act, federal funds are used to finance an immense range of local programs, which vary in possibly significant ways from State to State and district to district. A taxpayer's suit asserting a broad challenge to whole classes of programs in operation across the country would require the sifting of countless factual variations and could not fail to obscure the process of constitutional adjudication. Moreover, a taxpayer's suit brought against federal officials, who play no part in the design or implementation of State and local plans, is not well suited to probing the details on which constitutional differences may turn. This type of suit cannot achieve any reliable exploration of the critical facts in the absence of federal supervision over local decision-making; neither appellees nor other federal officials are authorized to exercise such supervision. Nor is there pressing need to carve an exception for cases such as this; there are modes of obtaining judicial review of various programs under this Act in which individuals with a more immediate personal interest in the outcome of the litigation would be asserting their claims directly against the State and

local officials who make the challenged decisions. These methods of securing judicial review obviously afford a sounder basis for constitutional adjudication than would taxpayers' suits.

ARGUMENT

I. SINCE APPELLANTS HAVE NOT SOUGHT TO ENJOIN THE OPERATION OF AN ACT OF CONGRESS ON THE BASIS OF ANY SUBSTANTIAL CLAIMS THAT THE ACT ITSELF IS UNCONSTITUTIONAL, A THREE-JUDGE COURT WAS NOT REQUIRED AND A DIRECT APPEAL TO THIS COURT DOES NOT LIE

We recognize that by noting probable jurisdiction the Court has at least preliminarily determined that the question of taxpayer standing is sufficiently debatable and important that summary disposition of the appeal was not called for. Nevertheless, we deem it our responsibility to call the Court's attention to certain other considerations which indicate that the case is not properly here on direct appeal. The Court has not infrequently raised, *sua sponte*, the jurisdictional question whether a three-judge court was required.³ It therefore appears incumbent upon the parties to raise such a question when in the course of preparing the case for presentation in this Court it fairly appears that a special statutory court was not required. See, e.g., *Thompson v. Whittier*, 365 U.S. 465. We turn first to this question.

1. Appellants invoke the authority of 28 U.S.C. 1253 (1964 ed.) to bring this case directly to this Court

³ E.g., *Kesler v. Department of Public Safety*, 369 U.S. 153, 155; cf. *Brown Shoe Co. v. United States*, 370 U.S. 294, 305-306.

from the district court. That statute confers jurisdiction to entertain such an appeal only from the grant or denial of an injunction in a civil action "required by any Act of Congress to be heard and determined by a district court of three judges." We did not contest the appropriateness of a three-judge court if dismissal by a single judge for a clear lack of standing was not in order, and did not advert to the question whether this action was "required" to be heard by a three-judge court when we filed our Motion to Dismiss or Affirm. In their opening brief in this Court, however, appellants have provided elaboration of the nature of their suit which reveals that, in focusing on the constitutional question of standing, the parties failed to recognize the other conditions in 28 U.S.C. 2282 (1964 ed.) which govern the requirement that certain suits be heard by three-judge courts.

2. Appellants' complaint refers only to Titles I and II of the Elementary and Secondary Education Act of 1965. The specific aspect of Title I that is spoken of is Section 205(a)(2), 20 U.S.C. 241e(a)(2), which permits federal grants to States for use by local educational agencies if the appropriate State educational agency has approved the local plans as making provision, *inter alia*, for "special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment)" in which educationally deprived children who attend private elementary and secondary schools in the district can participate.

The complaint specifically concedes that Congress did not intend, in enacting this provision, to require

that local educational agencies violate the First Amendment to the United States Constitution in order to qualify for funds (J.A. 6a-7a). Indeed, the complaint recites that there are many programs which can be and in fact have been instituted by local educational agencies like the New York City Board of Education which qualify for federal funds without violating the federal Constitution, in that they are conducted on public premises (J.A. 7a). Appellants next allege, however, that appellees have approved, and unless enjoined will continue to approve, programs of the same nature which are to be conducted in religious and sectarian schools (J.A. 8a).⁴ Two causes of action are then stated: first, that the "determination and action of the [appellees]" constitute an establishment of religion, and, second, that the "determination and action of the [appellees]" constitute a prohibition of the free exercise of religion, all contrary to the First Amendment (J.A. 9a). By way of relief, the complaint seeks (1) a declaration that the "determination and action" of appellees as set forth is unconstitutional (J.A. 9a), (2) a declaration that their "determination and action" is unauthorized and unintended by the Act, but if within the authority and intent of the Act "the Act is to that extent unconstitutional and void" (J.A. 10a), and (3) an injunction forbidding the appellees' approval of programs

⁴ Since this is an allegation of fact, its truth must be assumed for purposes of this appeal. We may note, however, that if the Commissioner did in fact approve individual projects and expenditures under them, he was acting extra-legally, for, under the statute, local projects under Title I are approved by the State agency but not by any federal officer.

for expenditures to finance programs in religious and sectarian schools (J.A. 10a).

Despite the formal, contingent reference to the question of the constitutionality of Title I, an understanding of the complaint as appellants themselves have explained it, and an awareness of the actual pattern of the statute they challenge, lead to the conclusion that it was unnecessary to convene a three-judge court to hear their claims. Section 2282 of the Judicial Code requires such a court only when a litigant seeks to enjoin "the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution * * *." It is clear, therefore, that a three-judge court is not indispensable unless an injunction is sought on the ground that a statute is unconstitutional. Yet appellants have expressly disavowed any such frontal attack on the validity of the statute here involved. In the Statement in their opening brief, they explain: "The plaintiffs do not challenge the constitutionality of the Elementary and Secondary Education Act of 1965." (Br. 4). They then immediately quote the paragraphs of their complaint supporting this position—paragraphs which acknowledge that many valid programs have been instituted under the aegis of the Act. (Br. 4-5). Appellants characterize as the "essence of the complaint insofar as Title I of the Act is concerned" (Br. 5) those paragraphs which complain of the use to which federal funds have been and will continue to be put.

That it is the specifics of administration that they assail rather than the constitutionality of the Act—a

distinction which, as discussed below, is decisive on the three-judge court question—becomes even more clear when other statements in their brief are examined in light of the structure of the Act. Essentially, Title I authorizes the approval of federal grants to States to facilitate the ability of their local educational agencies to meet the special remedial needs of educationally deprived children from low income families. Among other objectives, the Act contemplates that the local agency will make equitable provision for participation by such children who happen to be enrolled in private elementary and secondary schools. 20 U.S.C. 241e(a)(2). The decision as to the details of how federal funds will be used—whether for programs in public facilities or in religious or sectarian facilities, for instance—is in no way controlled by the Act. *Indeed, neither the appellees nor any other federal official participate in such a choice.* In fact, once this decision is made by the local educational agency, it is not even reviewed by appellees or any other federal officer; the local agency becomes eligible for a grant if the appropriate State educational agency approves its application by determining that the local plan meets the basic criteria of the Act. There is no project-by-project approval at the federal level, and neither the Act nor the regulations promulgated by the appellees express any preference on the question whether these services should be provided on public, sectarian, or even neutral premises. That choice rests with the local educational agency. In this context, the seemingly contradictory allegations in the complaint become recon-

cilable with the explanations in the appellants' brief. The latter demonstrate that appellants have not made any serious challenge to the constitutional validity of Title I.

As appellants make clear in this Court, the core of their objection to aid to private schools is that in some instances federally funded programs are allegedly being conducted on the premises of sectarian institutions. But, as we have seen, this is not dictated by the Act or even specifically approved by any federal official. So long as the State agency certifies that the local plan satisfies the Act's objectives of allowing educationally deprived children attending private schools to share in the remedial programs being offered for children of low-income families in general, the decision as to the site where such services are provided is left exclusively to the judgment of the local educational agency. It is the judgment made by the New York City Board of Education to which appellants really direct their constitutional objection, not the validity of Title I itself. Thus, appellants point out that in the course of arguing this case before the court below they "expressly stated that this case was to be deemed one limited to the practices of the New York City Board of Education" (Br. 4) (footnote reference to stenographic transcript omitted). Later on, they suggest, with some accuracy, that this suit "should have been deemed a suit against a municipality" (Br. 17).⁵

⁵ In subsequent argument, appellants urge that constitutional jurisdiction existed in the present case "even if it be deemed a suit against the Federal Government rather than the Board of Education of the City of New York" (Br. 24).

In this connection, we note that on the same date that this suit was filed in the United States District Court for the Southern District of New York, counsel for appellants also filed a suit in the New York State Supreme Court directly against the New York City Board of Education and other city and State officials. *Polier, et al. v. Board of Education of the City of New York, et al.*, (Sup. Ct., N.Y. County, Index No. 19540/1966). The "Litigation Docket of Pending Cases Affecting Freedom of Religion and Separation of Church and State" prepared by the Commission on Law and Social Action of the American Jewish Congress (No. 6, December 1, 1967) explains that the instant suit "parallels the *Polier* complaint with respect to the New York City programs under Title I of the Federal Elementary and Secondary Education Act of 1965 * * *" (p. 5). "Sponsors" for both suits are the same: the American Jewish Congress, United Federation of Teachers, United Parents Associations, and New York Civil Liberties Union (*ibid.*). The proceedings in the New York City suit have been adjourned by stipulation to await further action on this appeal. Although the seven appellants are nominally different from the seven plaintiffs in the New York City suit, both actions were brought by "citizens and taxpayers." The identity of the individuals in whose names the suits have been brought is immaterial in light of their reliance on taxpayer status to establish standing.

Reading the allegations of the instant complaint, then, with attention to appellants' own explanations, it is clear that they do not seek to enjoin the operation

of Title I "for repugnance to the Constitution", 28 U.S.C. 2282; rather, they contend that "the *administration* of the Elementary and Secondary Education Act of 1965 in New York and other parts of the nation is unconstitutional * * * (Br. 52) (emphasis added).⁶ But, irrespective of what may be taking place elsewhere, appellants explain that they seek to compel appellees "to defend only the programs and practices engaged in within the City of New York" (Br. 4).

So cast, the complaint in this case did not require a hearing before a three-judge district court. For a three-judge court to be required, a complaint must (1) raise a non-frivolous attack on the constitutionality of an Act of Congress, and (2) seek an injunction (3) against the operation, execution, or enforcement of the statute on that ground. Congressional insistence on three-judge courts in injunctive challenges to the constitutionality of federal legislation was designed to "prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme * * * by issuance of a broad injunctive order." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154. Because the evil sought to be avoided is the total interruption of an entire statutory plan by a single judge, this Court has made it clear that Congress did not intend to require a special court, with the attendant direct appeal, "when administra-

⁶A footnote explaining the contention that violations are taking place in other parts of the nation refers back to the earlier assertion that it "may be assumed that the practices within the City of New York complained of herein are paralleled in other parts of the nation * * *" (Br. 4), with a citation to the complaint in a pending Pennsylvania case.

tive action and not the Act of Congress is assailed." *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 174. When the object of the action is to establish that an official took unconstitutional action which was not authorized by a statute, a single judge may entertain the suit, for "an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification." *Phillips v. United States*, 312 U.S. 246, 252. It is not enough for plaintiffs (as the appellants do here) to impugn the statute which "may be said to authorize the questioned conduct": "the complaint must seek to forestall the demands of some general * * * policy, the validity of which [they] challenge * * *." *Phillips v. United States, supra*, 312 U.S. at 253.

While it may be possible to frame an attack on the constitutionality of Title I and seek to enjoin its implementation as such, appellants eschew that position. As we have seen, their principal focus is (at most) on appellees' approval of grants to States which will in turn be used to finance local programs that may include provisions for remedial services on sectarian premises. Their basic contention is that while even such remote federal participation violates the First Amendment, it was not intended by Congress when Title I was enacted. Appellees, they argue, are engaging in unauthorized conduct by approving funds for plans containing objectionable elements. This is obviously an argument directed to the construction of the Act, and not its constitutionality.

Only contingently and tangentially have appellants expressed doubts about the validity of the Act, and then only insofar as it may permit certain specific programs. Even if appellants initially leveled an attack on the constitutionality of the statute, they are free to by-pass the need for a three-judge court by restricting their complaint to the claim that the administrative action taken in implementing the statute is unauthorized. See *Ex parte Hobbs*, 280 U.S. 168, 171-172. Compare *Kennedy v. Mendoza-Martinez*, *supra*, 372 U.S. at 153-154.

In sum, while an attempt to enjoin the enforcement of a statute on the ground that it is unconstitutional as applied may prompt the convening of a three-judge court, no such special court is required where, as here, the complaint, as explained or clarified by the moving parties, "seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional," for in the latter situation "the attack is aimed at an allegedly erroneous administrative action." *Ex parte Bransford*, 310 U.S. 354, 361. But the extraordinary three-judge court requirement must be read narrowly, *Bailey v. Patterson*, 369 U.S. 31, 33, and when litigants like appellants have—in view of the remote relation between the Act and the specific programs about which they complain—fairly chosen to challenge the administrative decisions of the appellees (or more accurately, of the New York City Board of Education), a three-judge panel is not required. As they have limited their complaint, appellants do not seek a "broad injunctive order" which would "paralyze

totally the operation of [the] entire regulatory scheme" of Title I. *Kennedy v. Mendoza-Martinez*, *supra*, 372 U.S. at 154. At most, they wish to forbid further approval of local programs in New York which contain provisions they view as objectionable. This request could have been heard by a single district judge.⁷

3. The situation with respect to Title II of the Elementary and Secondary Education Act of 1965 appears to be the same. This title authorizes the approval of federal grants for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools. 20 U.S.C. 821(a). A State that wishes to obtain grants for this purpose must submit to the appellee Commissioner of Education a plan which, among other criteria, will provide assurance that "to the extent consistent with law" such materials "will be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools in the State * * *." 20 U.S.C. 823(a)(3)(B). The Commissioner plays no role in the determination by the State agency as to *where* these materials should be made available—the factor which appellants regard as decisive for constitutional purposes—so long as equitable access is guaranteed. The State plan may or

⁷ *Zemel v. Rusk*, 381 U.S. 1, is not to the contrary. There, the Court held that a litigant need not elect between non-constitutional and constitutional attacks pleaded in the alternative, in order to secure a three-judge court. 381 U.S. at 5-6. That is not this case, for appellants here have chosen to concentrate on the alleged unlawfulness of administrative action and have specifically conceded the basic constitutionality of Title I.

may not disclose the place and manner of providing books and materials for the use of private school children. The complaint contains no allegation concerning the content of the New York State plan under Title II, or of the plan of any other State, for that matter.

Fairly read in light of appellants' characterizations as previously discussed, their complaint does not seek to enjoin the operation of Title II on the ground of its repugnance to the Constitution. The heart of their factual allegations concerning this title is that large sums of federal funds, "with the consent and approval of the [appellees], have been and continue to be used and, unless enjoined by this Court, will continue to be used to finance the purchase of textbooks and instructional materials for use in religious and sectarian schools" (J.A. 8a). Again the focus is objectionable *use*. Both counts of their causes of action are cast in terms of alleged First Amendment violations resulting from the "determination and action" of the appellees (J.A. 9a), and it is the approval of such programs for New York City which appellants seek to enjoin (J.A. 10a; Br. 3-4). Section 2282 of the Judicial Code, for reasons discussed above in connection with Title I, does not require that appellants' disagreements with the operation of individual federally-funded plans drawn up by State and local authorities be considered by a court of three judges.

Because the allegations and prayers in appellants' complaint were not of the kind "required by any Act of Congress to be heard and determined by a district court of three judges," this Court does not have jurisdiction to entertain a direct appeal under 28 U.S.C.

1253. The Court may dispose of this improper appeal by vacating the judgment of the district court dismissing the complaint, and remanding the case to that court with directions to enter a fresh decree from which appellants may take a timely appeal to the court of appeals on any issues not necessarily disposed of in the course of holding that a three-judge court was not required. See *William Jameson & Co. v. Morgenthau*, *supra*, 307 U.S. at 174; *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 304 U.S. 243, 251-252; cf. *Moody v. Flowers*, 387 U.S. 97, 104; *Phillips v. United States*, *supra*, 312 U.S. at 254.

II. THE JUDICIAL POWER UNDER ARTICLE III OF THE CONSTITUTION DOES NOT EXTEND TO A REQUEST BY A FEDERAL TAXPAYER FOR A RULING ON THE CONSTITUTIONALITY OF EXECUTIVE OR LEGISLATIVE ACTION INVOLVING THE SPENDING OF TAX REVENUES, IN THE ABSENCE OF SOME DIRECT AND DEFINABLE IMPACT ON THE PLAINTIFF

On the issue of standing, should the Court proceed beyond the jurisdictional question, the case brings into sharp focus a fundamental disagreement as to the constitutional plan for the federal judicial function. The question presented by appellants (Br. 2) is whether "citizens and taxpayers of the United States" have standing to resort to the federal courts to challenge an expenditure as contravening the First Amendment. No direct legal interest is asserted in the program funded by the expenditure apart from appellants' tax contributions into the general treasury. Appellants' basic position is that whenever questions of constitutional interpretation arise in the course of governmental administration the federal judicial

power is automatically available, irrespective of whether the person seeking judicial guidance can point to some legally protected interest, not shared with the citizenry at large, which warrants judicial attention to his complaint. Under this view rules of standing are seen as little more than annoying technicalities, which can and should be brushed aside whenever their effect is to prevent or postpone judicial treatment of important constitutional questions. In short, the argument is that standing should be found because the ultimate question tendered is substantial—in the abstract, even though there is no measurable impact on the plaintiff.

Yet it is clear that the "Judicial Power" given to the courts of the United States by the Constitution extends by its terms only to "Cases" or "Controversies." And it has long been settled and accepted that the federal courts can only decide actual controversies between parties directly affected by the questions in suit and by their resolution. Courts decide questions of constitutional interpretation only where necessary to the disposition of a case or controversy, not merely on the bare request for advice from a governmental official or a private citizen. The Executive and Legislative Branches of the Government of course share a co-equal obligation to decide questions of constitutional interpretation when necessary to the performance of the executive and legislative functions, and these decisions are subject to judicial review only in a *bona fide* case or controversy. Under this view, the "Case" or "Controversy" language of Article III provides a purposeful and effective limitation on the

judicial function. It is indeed circular argument to contend that, since federal courts have the power to decide questions of constitutionality only when necessary to the disposition of a case or controversy, the term "case or controversy" should be broadly construed whenever necessary to permit this Court to address itself to a question of constitutionality. Yet the device of a federal taxpayer suit is, we believe, dependent on just such an argument. To permit such taxpayer suits would alter the plan conceived nearly two centuries ago; it would open the federal courts to consideration of virtually every imaginable question bearing on the constitutionality of the actions of the Executive and Legislative Branches. By the same token, it would undermine the organic structure whereby those co-equal Branches have the final responsibility for resolving constitutional questions which arise within their spheres of activity, unless and until those decisions are challenged in a "case" brought by a person who can point to some definable interference with his rights.

We note another defect in appellants' position—their assumption that only a taxpayer's suit can raise the constitutional questions they seek to litigate. As we explain in Part III below, there are other mechanisms for presenting the constitutional issues appellants seek to litigate in a manner far more appropriate to informed constitutional adjudication.

1. In developing our consideration of this question, we turn first to this Court's decision in *Frothingham v. Mellon*, 262 U.S. 447, where, also, the plaintiff sued as a federal taxpayer. She challenged the constitu-

tionality of using federal tax revenues to make grants to the States under the Maternity Act for the purpose (as in the instant case) of promoting the general welfare (there, by helping to alleviate infant mortality). The basis of the challenge was that the Maternity Act was beyond any of the powers granted to Congress by the Constitution. Mrs. Frothingham's argument on the merits—which at that time was admittedly substantial—was that acts of Congress cannot be independently justified under the General Welfare Clause; and that the Maternity Act did not fall within any of the more specific, enumerated powers given to Congress by the Constitution. The question of Mrs. Frothingham's standing to sue as a federal taxpayer was fully discussed in both briefs. (October Term 1922, No. 962, Brief for Appellant at pp. 5-10; Brief for Defendants and Appellees at pp. 13-18.) Mrs. Frothingham contended that—

If these payments [under the Maternity Act] are made, this plaintiff will suffer a direct injury in that she will be subjected to taxation to pay her proportionate part of such unauthorized payments. * * *

(Brief for Appellant at p. 10.) The Solicitor General contended that no justiciable controversy was presented. (Brief for Defendants and Appellees at 13.)

The Court held that Mrs. Frothingham's status as a taxpayer did not confer standing to challenge the use of federal revenues. The Court carefully cast this decision in terms of the power and responsibility of the various Branches under the Constitution (262 U.S. at 488-489):

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. * * * We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position

of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.

The Court thus viewed the "case" or "controversy" language in Article III as a real limitation on the occasions in which federal courts have power to interpret the Constitution. Significantly, there is no hint that the Court was confining its definition of its constitutional function to claims less favored in our hierarchy of values.⁸ Rather, the Court spoke of fundamental judicial incapacity resulting from the Constitution itself. This awareness, we submit, reflected the understanding and intention of the Framers. When Dr. Johnson, at the Constitutional Convention, moved to extend the judicial power to cases arising under the Constitution of the United States, as well as under its laws and treaties, Madison "doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution & whether it ought not to be limited to cases of a Judiciary Nature. *The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.*"² Farrand, *The Records of the Federal Convention of 1787* (1911) at 430 (emphasis added). The motion passed, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." *Ibid.* This exchange underlines the sense of the Con-

⁸ We note that *Frothingham* was decided in an era when this Court took a restrictive view of federal welfare legislation, and before the Court distinguished between "preferred freedoms" and other constitutional limitations. See *United States v. Caroleone Products Co.*, 304 U.S. 144, 152 n. 4.

vention that each branch of the Government has the "right of expounding the Constitution" in connection with the performance of its constitutional function. This plan is necessarily controverted by appellants' position, which assumes that a case "of a Judiciary Nature" must be presented by any governmental action involving a question of "expounding the Constitution."

In practical effect, acceptance of federal taxpayers' suits would convert the federal judicial system into a council of revision, empowered to rule, at the behest of any of seventy-odd million taxpayers, on the constitutionality of any action by the President or Congress involving the expenditure of money. Yet the Constitutional Convention itself deliberately rejected several efforts to provide in the Constitution for a Council of Revision, which would have included members of the federal judiciary and would have had the authority to "examine every act of the National Legislature before it shall operate." 1 Farrand, *The Records of the Federal Convention of 1787* (1911) at 21, 97-98, 108-110, 138-40; 2 Farrand, *op. cit., supra*, at 73-80. And while the primary objection urged against the proposal was that it would involve judges in decisions of policy as well as constitutionality (1 Farrand, *op. cit., supra*, at 97-98),* the members of the Convention were certainly aware of the provision which had recently been included in the Pennsylvania Constitution of 1776,

* It was also argued that "the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation." 1 Farrand, *op. cit., supra*, at 98.

creating an elective Council of Censors to meet every seven years "to enquire whether the constitution has been preserved inviolate in every part." Pennsylvania Constitution of 1776, Sec. 47, quoted in Sutherland, *Establishment According to Engel*, 76 Harv. L. Rev. 25, 43 (1962). The Convention made amply clear that it did not propose to give the federal courts a roving commission to enquire whether Congress and the President have been observing the Constitution. Yet this would be the practical consequence of permitting federal taxpayer suits.

The original understanding of the judicial function was expressed in *Marbury v. Madison*, 1 Cranch 137, 177-178, where this Court announced the power to pass on the constitutional validity of an Act of Congress not because "expounding the Constitution" was considered the unique and inseparable responsibility of the courts, but rather because decision of constitutional questions becomes necessary in the disposition of cases within the judicial sphere:

Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. * * *

See, also, *Muskrat v. United States*, 219 U.S. 346, 361-363; *Blair v. United States*, 250 U.S. 273, 279; compare *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 345-348 (concurring opinion of Brandeis, J.).

It would seem clear that the case or controversy limitation prevents this Court from ruling on a constitutional question involving the operation of the Executive or Legislative Branches simply because the President or Congress asks for a ruling. *Muskrat v. United States*, 219 U.S. 346; see Correspondence of the Justices (1793), reprinted in Hart & Wechsler, *The Federal Courts and the Federal System* (1953) at 75-77. Yet it is now urged that the federal courts should rule on any constitutional question involving the operation of the Executive and Legislative Branches (provided some money is spent), whenever a citizen-taxpayer asks for a ruling. We find the distinction difficult to grasp. In both cases, without the presence of a direct, definable, adverse interest, the only justification for assumption of jurisdiction would be the notion that the federal courts must pass on all constitutional questions as soon as anyone raises a protest. This proposition is, we believe, fundamentally at odds with the doctrine of separation of powers.

The country's political history confirms our thesis. From the earliest times, the Executive and the Congress have recognized their responsibility to conform their conduct to the dictates of the Constitution whether or not their decisions will subsequently be subjected to judicial scrutiny. When this Court refused to render advice to President Washington on

questions of international law, it effectively committed to his sole judgment the responsibility for deciding, in conformity with his appreciation of his official duties, what course of action to follow.¹⁰

There is nothing intolerable about the possibility that a particular federal program may not become a prompt subject of judicial review. Before a program becomes operative, two other Branches of the government, not insensitive to constitutional limitation, have at least implicitly found it agreeable to the Constitution. To paraphrase Justice Holmes' comment in *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U.S. 267, 270, "[I]t must be remembered that [those Branches] are ultimate guardians of the liberties and welfare

✓ ¹⁰ The result that automatic judicial review would be likely to have on the attitude of Congress toward its responsibility to apply the Constitution has been aptly stated:

One further point, there is a danger in our approach of putting all our eggs in the judicial basket. We are more and more getting to the idea, apparently implicitly, that the only forum, the only governmental unit to protect civil liberties, is the court; that the President has no responsibility; that the legislature has no responsibility. Just find a way to get into court, and all our problems are solved.

I think that the Constitution of the United States is not merely a mandate to the courts. It is a mandate to the executive and to the legislature, and we have to make the constitutional fight in the legislature as well as in the courts. It is the easiest thing in the world for Congress to say, "Pass the law; don't worry about the constitutionality. Let the Supreme Court pass upon the Constitutionality." We should fight within the Congress on constitutional issues and not give it an easy out by saying, "Let the Supreme Court protect us and give it all the responsibility."

Pfeffer, *Conference on Public Aid to Parochial Schools and Standing To Bring Suit*, 12 Buffalo L. Rev. 35, 64 (1962).

of the people in quite as great a degree as the courts." See, also, *United States v. Butler*, 297 U.S. 1, 87 (Stone, Brandeis, and Cardozo, JJ., dissenting).

So saying, we do not mean to suggest, of course, that the Elementary and Secondary Education Act of 1965, is not judicially reviewable.¹¹ Rather, it is pertinent to bring this perspective to bear in analyzing appellants' argument that the presence of a constitutional question should itself militate in favor of according *them* standing as taxpayers.

2. Appellants argue that federal taxpayer suits must be considered consistent with the judicial function as delineated by the "case or controversy" limitation of Article III, because this Court has assumed jurisdiction in *State* and municipal taxpayer suits. *Everson v. Board of Education*, 330 U.S. 1; *Cochran v. Louisiana State Board of Education*, 281 U.S. 370; *Adler v. Board of Education*, 342 U.S. 485; *Wieman v. Updegraff*, 344 U.S. 183, *Hawke v. Smith*, 253 U.S. 221; *Heim v. McCall*, 239 U.S. 175. There cannot, it is argued, be any constitutional significance in the difference between the interest of a State or local taxpayer in State or local expenditures, and the interest of a federal taxpayer in federal expenditures. This contention, however, ignores the fact that the State and local taxpayer cases generally arise in State courts and invariably involve the validity of State statutes or executive action in States recognizing taxpayer suits.¹² And insofar as those cases ignore the jurisdictional

¹¹ See the discussion in Point III, *infra*, pp. 55-57.

¹² *Crampton v. Zabriskie*, 101 U.S. 601, recognized standing on the part of a New Jersey municipal taxpayer. While the case arose in a federal court in New Jersey, the State courts

questions, we suggest that they are slim basis for undercutting this Court's specific pronouncements against federal taxpayers' suits.

Moreover, despite the dissenting judge's assertion (J.A. 41a), such a situation creates no "ludicrous anomaly" or "logically unacceptable paradox." The intentional design of the Framers that this Court serve a unique function as arbiter of the federal system, see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 337-352, *Cohens v. Virginia*, 6 Wheat. 264, 413-423, explains why the existence and assertion of federal judicial power has special significance with respect to constitutional challenges to State conduct. The instant case, by contrast, involves the question of the role of the federal courts vis-à-vis the coordinate Branches, a question which turns on the principle of separation of powers rather than national supremacy. Where the State judiciary recognizes a right to sue and assumes jurisdiction to pass on the validity of acts of its executive or legislative branches, it is consonant with this Court's role in the federal system for it to assume jurisdiction when federal constitutional questions are presented.¹³ On the other hand, acceptance of federal taxpayers' suits would require this Court to assume

recognized standing in this type of suit. *State, Gregory, Taylor et al. v. Jersey City*, 34 N.J.L. 390 (1871).

To the extent that *Millard v. Roberts*, 202 U.S. 429; *Wilson v. Shaw*, 204 U.S. 24; and *Bradfield v. Roberts*, 175 U.S. 291, can be regarded as implicitly sustaining federal taxpayers suits, they were expressly overruled by *Frothingham*, 262 U.S. 486.

¹³ But even in this context, where the appropriateness of federal judicial review is at its zenith, the Court has made it clear that its jurisdiction is circumscribed by the requirement that

the function of constitutional censor as to every act of the President or Congress involving the expenditure of money. Such an undertaking, we submit, would not be consonant with this Court's role in a government of divided powers.¹⁴

3. *Doremus v. Board of Education*, 342 U.S. 429, confirms the teaching of *Frothingham* that a suit

the issue be presented in the context of a concrete "case or controversy." *Doremus v. Board of Education*, 342 U.S. 429.

¹⁴The difference is reflected in *Coleman v. Miller*, 307 U.S. 433, where Kansas State legislators who had voted against ratification of the Child Labor Amendment were held to have standing to seek review of a State court's refusal to enjoin State officials from certifying that Kansas had ratified the Amendment. Surely, *Coleman v. Miller* does not mean that the federal courts could entertain a suit by a Congressman or Senator to invalidate an Act of Congress which he had voted against, even if his opposition had a constitutional foundation. In short, attacks on State statutes brought in States which recognize taxpayer suits do not involve a separation of powers problem, which was one of the primary origins of the case or controversy limitation.

It has also been suggested that the *Frothingham* case cannot be a part of the "case or controversy" limitation, since Congress may confer standing on a limited class of persons—such as competitors hurt by a grant of a license, or consumers hurt by a price-fixing order—to act as "private Attorney Generals" in suing to challenge official conduct. *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4, 14; *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470; *Associated Industries v. Ickes*, 134 F. 2d 694, 704 (C.A. 2), vacated for mootness, 320 U.S. 707. See Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 272-274 (1961). However, in these cases Congress conferred a right to sue on a specified class of persons who had suffered a particular and ascertainable injury as a result of the challenged official action. This, we submit, is far different from the conferral of a right to sue on any taxpaying member of the general public.

brought by a plaintiff solely in his capacity as a taxpayer does not come within the ambit of federal jurisdiction. There, this Court was asked to review a determination of a federal constitutional question by a State court which accepted the standing of taxpayers. Notwithstanding the State court's assumption of jurisdiction, this Court undertook an independent examination of the facts alleged to sustain federal jurisdiction, explaining that whether "such facts amount to a justiciable case or controversy is decisive of our jurisdiction." 342 U.S. at 433. The Court then determined that, because the complaint contained no suggestion that the religious practices complained of were financed by a separate assessment or that they in any way increased the cost of running the schools, there was indeed no basis for federal jurisdiction. While conceding that taxpayer actions have been entertained or reviewed in federal courts, the Court explained that the test is whether the suit is a genuine "pocketbook action" where the plaintiff can demonstrate a "direct and particular financial interest." A suitor complaining of a "religious difference" cannot establish "a legal case or controversy" by a "feigned issue of taxation." 342 U.S. at 434, 435.¹⁵ Clearly this case presents no more. Not only are appellants unable even to allege that their tax liability would be affected by success on the merits, but it seems fair to note that it might in fact be more costly to provide federally funded services on public premises—which they spe-

¹⁵ Even the three Justices who dissented from dismissal for want of jurisdiction recognized that under *Frothingham* "if this were a suit to enjoin a federal law, it could not be maintained * * *." 342 U.S. at 435.

cifically concede is constitutional—rather than on sectarian premises constructed and maintained by private contributions.

4. Appellants contend, however, that these considerations should not preclude the liberal assertion of First Amendment claims. It is unnecessary to go beyond *Doremus* to realize that the presence of a First Amendment claim does not create an exception to the constitutionally designed limitation on federal judicial jurisdiction. Moreover, we suggest that the intensely practical underpinnings of the doctrine of separation of powers which the Framers carefully made the basis for the operation of the national government apply with equal force to the Church-State problems which appellants wish to litigate. If this Court should endorse the assumption that all constitutional questions in this area are automatically subject to judicial review, it is not unlikely that this awareness would tend to dilute the exercise of responsibility in this area by the Congress and the Executive. But it is the legislative and administrative processes which are peculiarly geared for making the delicate policy judgments on how best to accommodate the needs and goals of a happily diverse society. The nature of the judicial process makes it inherently unsuited to drawing the necessarily fine distinctions that must be made in comprehensive public welfare programs, especially in the absence of a clearly defined controversy between persons asserting specific, identifiable, and conflicting interests. The judicial power was confined to "Cases" because it is the unique function of the judicial process to focus on a con-

test between adverse parties asserting conflicting claims in connection with a specific personal or property interest. But as this case illustrates, an abstract and ill-defined objection cast in doctrinaire terms does not call for any consideration which is peculiarly judicial. Yet the constitutional plan consigns to the federal courts only those questions which are of a "Judiciary Nature."

5. In passing the Elementary and Secondary Education Act of 1965, Congress clearly recognized its obligation to conform its legislation to constitutional standards. Even though Congress was well aware of the possibility that the *Frothingham* rule would impede judicial review,¹⁶ the congressional debates ex-

¹⁶ In the debate on the proposed amendment which would have authorized judicial review of any portion of the Act, Congressman Celler stated: "We have been told—correctly, in my opinion—that the Constitution does not permit the courts of the United States to decide an issue at the request of someone whose sole interest in the matter stems from the fact that he is a taxpayer and that an expenditure of Federal funds is involved." 111 Cong. Rec. 6132. Congressman Celler's opposition to the judicial review provision stemmed from his position that it was not needed because the federal courts would find standing wherever constitutionally permissible, and thus a statute would add nothing. *Ibid.* Both Congressman Celler (*Ibid.*), Congressman Pucinski (111 Cong. Rec. 5973), and the Senate Committee (S. Rep. No. 146, 89th Cong., 1st Sess., at 35), thought that as a constitutional matter standing might be found to challenge any provision of the Act, by an extension of the school prayer cases. In those cases, of course, plaintiffs were accorded standing as parents of children in schools affected by the challenged establishment. *Engel v. Vitale*, 370 U.S. 421; *Abington School Dist. v. Schempp*, 374 U.S. 203.

In the Senate, Senators Cooper and Morse recognized that under *Frothingham* a federal taxpayers' suit could not be

hibit a pervasive concern for the constitutional considerations.¹⁷ The sponsors of the legislation thought that it was constitutional, and it would not have passed had the major elements interested in the legislation failed to agree with that proposition.¹⁸

In order to avoid establishment problems, Congress provided various restrictions on the use of federal grants. As we have seen, Section 805, 20 U.S.C. 885, directs that the Act may not be construed to authorize payments for religious worship or instruction.¹⁹ To forestall any suggestion that aid extended to children and teachers in sectarian schools under Titles I and II allows sectarian schools to divert their resources to the religious aspect of the children's education, Congress specifically directed that federally funded services and materials may not supplant those which

brought, but thought that a state taxpayers' suit in a state court might suffice to raise the necessary constitutional questions. 111 Cong. Rec. 7316-18.

¹⁷ See 111 Cong. Rec. 5761 (Rep. Griffin); 5762-3 (Rep. Thompson); 5961 (Rep. Roosevelt); 5962 (Rep. Farbstain); 5977-8 (Rep. Cahill); 5983 (Rep. Scheuer); 5985 (Rep. King); 5986-7 (Rep. Goodell); 5988 (Rep. Green); 7307-8 (Sens. Morse and Ellender); 7316-18 (Sens. Cooper and Morse); 7531-32 (Sen. Ribicoff).

¹⁸ See 111 Cong. Rec. 7317 (Sen. Morse); 7531-32 (Sen. Ribicoff); 57433-36 (Rep. Powell).

¹⁹ In this respect, the Elementary and Secondary Education Act of 1965 is typical of congressional sensitivity to First Amendment questions in modern programs of federal aid to education. Other statutory safeguards have been provided in Section 403(d) of the National Defense Education Act, 20 U.S.C. 463(d) (1964 ed.); Section 401 of the Higher Education Facilities Act of 1963, 20 U.S.C. 751(a)(2)(C)-(D); and Sections 111, 207, 526, and 609 of the Higher Education Act of 1965, 20 U.S.C. 1011, 1027, 1116, and 1129.

otherwise would have been provided, and the Commissioner's regulations give further force to this policy. See 20 U.S.C. 823(a)(5); 45 C.F.R. 117.5(a)(5); 45 C.F.R. 117.24; 45 C.F.R. 116.17(h); 45 C.F.R. 116.19 (c) and (e); see, also, 20 U.S.C. 241g(c)(2).

The constitutional problems involved in federal aid to elementary and secondary education are, we believe, peculiarly appropriate for congressional resolution. In giving such aid, Congress faced the task of finding an accommodation between two principles. On the one hand, parents have a constitutional right to send their children to sectarian schools, provided they comply with State requirements, *Pierce v. Society of Sisters*, 268 U.S. 510, and millions of children go to such schools. Congress quite reasonably determined that these children should be allowed to participate in a general federal program to equalize educational opportunities in low-income areas. Yet, on the other hand, the government may not aid a religious establishment. To a large extent, the validity of the congressional reconciliation between these two constitutional provisions may turn on the practical effect of the Act as it operates in local school districts. In such matters, legislative flexibility to experiment and adjust should be paramount, free from judicial supervision at the behest of litigants whose only demonstrable interest is that their tax dollars are perhaps playing some minute role in the experiment.

6. It is also argued that *Frothingham* does not apply to a case brought under the First Amendment, since that Amendment involves rights of religious liberty and conscience which have a preferred position

and have traditionally been committed to the federal courts for enforcement. The short answer is that there is nothing in the Constitution to exempt First Amendment cases from the "case or controversy" requirement of Article III. The framers rejected *in toto* the concept of a Council of Revision to oversee the constitutionality of acts of Congress; they did not except any questions from the limitation confining the federal judicial power to "cases of a Judiciary Nature." This Court in dismissing the appeal in *Doremus, supra*, for want of federal jurisdiction necessarily determined that the addition of the First Amendment did not serve to modify the original intention and effect of Article III.

In any event, the "preferred position" of the First Amendment, to the extent that it does and should exist, does not advance appellants' contention that taxpayers *qua* taxpayers should have standing to raise First Amendment claims. The "preferred position" doctrine properly applies to insure that society may not single out an individual to be subject to special disabilities or discrimination because of religious or political views. See, *e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479; *Sherbert v. Verner*, 374 U.S. 398; *West Virginia Board of Education v. Barnette*, 319 U.S. 624. In these cases, the focus of adjudication is the impact of governmental action on individual rights, and the litigant has standing to object because he is personally affected in some particularized sense. Even in Establishment cases, where the government sponsors a religious exercise in a school, the court can focus on the effect of the exercise on the pupil whose

conscience it offends. See *Abington School Dist. v. Schempp*, 374 U.S. 203; *Engel v. Vitale*, 370 U.S. 421. The traditional focus of the judicial function has been the impact of governmental action on the rights of an ascertainable individual or group. The "preferred position" doctrine prompts no departure from that process.

The fact that the First Amendment operates to prevent compulsory taxation to support religious establishments (*Everson v. Board of Education*, 330 U.S. 1, 11-13) does not confer standing on appellants as taxpayers. Unlike the plaintiffs in *United States v. Butler*, 297 U.S. 1, 57-61, appellants do not resist the collection of any tax; nor do they claim that their taxes should be lower.²⁰ Rather, they claim that, having paid their taxes, they are entitled to supervise the use to which tax funds are put, in order that they may assure themselves that no violation of the Establishment Clause occurs. Nor do appellants claim that their future tax liability would be affected if they prevailed on the merits of this suit; they cannot assert either that the taxes *they* paid are being devoted to a program to which they object, or even that their taxes freed funds that otherwise would not have been available for application to the programs

²⁰ Of course, if a special tax were levied to support a religious establishment, as in the case of the bill in the Virginia Assembly to which Madison's famous "Memorial and Remonstrance Against Religious Assessments" was addressed, the standing of a taxpayer to resist collection of the tax would be clear. See *Everson v. Board of Education*, 330 U.S. 1, 72-74 (Supplemental Appendix to dissenting opinion of Rutledge, J.)

attacked. In this light, it is difficult to fathom why their status as taxpayers should accord them any greater power to invoke the federal judicial function than a citizen *qua* citizen may have.²¹

Appellants' position thus reduces itself to an assertion that they should be allowed to seek judicial aid to protest federal programs which offend their sensibilities. Where the federally funded program has an undeniably valid secular objective and the impact on the general class of taxpayers or citizens is as remote as in this case, members of those classes who can point to no more specific interest do not have standing to institute a federal court challenge to the program.

In this case, moreover, appellants are suing, not officers who are making the expenditures to which they object, but officers who at most have permitted others to make those expenditures from federally-granted funds. Even if taxpayers had standing to sue a federal officer who makes payments for an improper purpose, all appellants would be entitled to protest is the constitutionality of the grants to the State of New York and other States. This they have not sought to do. They insist, on the contrary, that the general structure of the Elementary and Secondary Education Act is constitutionally permissible; they object only to certain uses of a small part of the granted funds

²¹ It is interesting to note that the Senate judicial review bill, S. 3, 90th Cong., 1st Sess., would not only purport to confer standing on federal taxpayers to raise First Amendment challenges to certain federal welfare programs (Section 3(a)), but would also attempt to authorize "any citizen" of the United States to bring such suits, without more (Section 3(b)).

made by appellees' grantees or subgrantees. It is difficult enough, as *Frothingham* demonstrates, to find an "injury" to a federal taxpayer in a federal expenditure that violates the Constitution. It is even more difficult to find such an "injury" in a federal expenditure that may, but need not, be so used as to violate the Constitution. Yet, vis-à-vis appellees, this is the "injury" that appellants allege.²²

8. There are, of course, intensely practical underpinnings to the rule precluding federal litigation where the plaintiff's only legal interest is his rather attenuated concern for the fate of his tax payments. Analysis of these consequences underscores the soundness of the Framers' decision to limit judicial recourse to persons who can demonstrate that they will be immediately affected by the outcome of their lawsuits. It has been argued that the effect of overruling *Frothingham* would not be very great, since only a few decisions would be needed to establish the constitutionality of most federal spending programs. *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 2097, 89th Cong., 2d Sess., part 2, at 494* (remarks of Professor Davis). We submit, however, that overruling *Frothingham*—even

²² Implicit in appellants' argument is an assumption that federal granting officers are responsible to preclude any unconstitutional use of the granted funds by their grantees. Congressional delineation of federal responsibility does not suggest such a duty. Considering the multiplicity of federal grant programs (the Department of Health, Education, and Welfare alone administers some 200 such programs), the validation of this assumption would in itself have far-reaching effects on federal-state, federal-local, and federal-institutional relationships.

in the Establishment Clause area, for which appellants suggest special treatment—would bring before the federal courts a host of questions that could not be solved without protracted and vexing litigation.

This Court's own experience illustrates that even the seemingly broadest questions in this area do not admit of simple solutions in a single suit. Thus, twice the Court was called upon to examine the constitutionality of released-time programs,²³ while two more decisions were required on the question of the constitutionality of religious recitation in public schools.²⁴ Yet there are literally scores of different programs in operation under the Elementary and Secondary Education Act alone (described at pp. 46-53, *infra*), which vary in potentially significant ways. Indeed, the prospect for litigation under this one Act would be magnified as taxpayers sought to contest the modifications made to numerous local plans over the years.

Nor would the litigation engendered as a result of overruling *Frothingham* be confined to the Elementary and Secondary Education Act and the other federal programs of aid to education which involve church-supported educational institutions.²⁵ If tax-

²³ *McCullum v. Board of Education*, 333 U.S. 203; *Zorach v. Clauson*, 343 U.S. 306.

²⁴ *Engel v. Vitale*, 370 U.S. 421; *Abington School Dist. v. Schempp*, 374 U.S. 203.

²⁵ The G.I. Bill of Rights, 38 U.S.C. 1601 *et seq.*; The National School Lunch Act, 42 U.S.C. 1751 *et seq.*; National Defense Education Act, 20 U.S.C. 421 *et seq.*; Higher Education Facilities Act of 1963, 20 U.S.C. 701 *et seq.*; Economic Opportunity Act of 1964, 42 U.S.C. 2701 *et seq.* (community action programs under Title II of the Act, 42 U.S.C. 2781 *et seq.*), may involve arrangements with church-related agencies.

payers are held to have standing to protest the use of tax revenues in aid-to-education programs, they would also have constitutional status to challenge other federal expenditures. In short, if *Frothingham* is overruled, the prospect is that the federal courts will be continuously involved in monitoring governmental activity for traces of religious content or effect at the instance of persons who can demonstrate no direct, concrete impact on themselves. The courts will also be involved in the sort of detailed and immediate supervision and review of legislative and executive actions which is wholly unsuited to judicial action.

III. THERE IS NO COMPELLING REASON TO ACCORD THE INSTANT TAXPAYERS' SUIT EXCEPTIONAL TREATMENT

Some commentators have suggested that the *Frothingham* rule is not one of constitutional dimensions—that its application is a matter of judicial discretion, dependent on the nature of the case. Jaffe, *Judicial Control of Administrative Action* 483-490 (1965). Appellants argue that, at least where First Amendment claims are raised, traditional rules of standing should be waived. For the reasons elaborated above, we disagree with that view. However, even if it is assumed *arguendo* that federal taxpayer suits are permissible and appropriate in some circumstances, this case does not warrant exceptional treatment. Indeed, in light of the nature and structure of the Elementary and Secondary Education Act of 1965, the instant suit is singularly inappropriate.

The Act does not establish any single scheme or program. Rather, it authorizes the financing of programs

planned and administered by local school authorities. And while the local programs must conform to broad federal guidelines, these programs can—and do—vary in significant ways from district to district according to the manner in which the local authorities formulate and administer the programs. In any adjudication of the constitutionality of programs under the Act, the court must accordingly focus on the particular facts of these programs as they are planned and administered in a particular locality. See *McCollum v. Board of Education*, 333 U.S. 203, 226 (concurring opinion of Frankfurter, J.), stressing “the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied.” The factual disparity among the many local plans indicates that the constitutional questions that the programs may raise could not be decisively answered in anything short of an extensive patchwork of litigation. Moreover, if this Court were to hold that a federal taxpayer may sue for review of programs under this Act, it would seem that a federal taxpayer living in New York City would have as much right to challenge a federally funded program operating on the West Coast as in his own locality. If he has a right to sue as a federal taxpayer, he has a right to insist that the district court pass on the constitutional validity of any local program financed with federal funds under the Act ²⁶—

²⁶ While appellants’ complaint is worded broadly (J.A. 6a-10a), they now assert that they have limited their action to programs in New York City. It is, of course, their prerogative to limit their complaint (see Point I, *supra*). But this does not solve the problem. For if it were held that appellants have standing as federal taxpayers, any such limitation would be

including programs funded under appellees' authority but designed and implemented beyond the forum of the suit. The district court thus faces the dilemma of (1) reviewing in detail the facts of numerous types of programs operating in different areas of the nation or (2) undertaking to formulate general constitutional guidelines for the local programs under attack without the detailed investigation and assessment of particular facts which is essential to informed constitutional adjudication in the difficult and troubled area of federal aid to education. In order to appreciate the potential combinations and permutations under this one Act it is necessary to examine more specifically than we have thus far its structure and operation.

1. Under Title I of the Elementary and Secondary Education Act of 1965, the Commissioner of Education makes grants to States to finance programs formulated by local educational agencies, 20 U.S.C. 241e. The programs must meet two basic requirements: (1) they must be "designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families" and be "of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting those needs", and (2) provision must be made, to the extent consistent with the number of educationally-deprived private school children entirely voluntary on their part: other plaintiffs, in another suit, would be entitled as federal taxpayers to insist on having all federally funded programs under the Act reviewed in a single lawsuit, regardless of locality.

in the district, for their participation in "special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment)." 20 U.S.C. 241e (a)(1) and (2). The regulations (45 C.F.R. 116.16-116.25) preserve the broad discretion given by the statute to the local authorities, within the limits of congressionally-intended safeguards.²⁷ Indeed, the regulations specifically direct the local authorities to tailor their programs to local needs and circumstances. 45 C.F.R. 116.17(e). In this respect, the regulations are effectuating specific legislative intent. The Committee reports list 49 examples of types of programs that could be financed under Title I, stating that local educational agencies are to have "wide latitude" in fashioning programs in which private school pupils can participate. S. Rep. No. 146, 89th Cong., 1st Sess., at 10-11, 28; H. Rep. No. 143, 89th Cong., 1st Sess., at 17.

²⁷ 45 C.F.R. 116.19(d) proscribes separation by school enrollment or religious affiliation where projects involving joint participation by private and public school children are carried out in public facilities; 45 C.F.R. 116.19(e) states that public school personnel may be made available to other than public school facilities only to provide specialized services for educationally deprived children not normally provided by the private school; that mobile equipment only may be placed on private school premises and must be removed at the end of the project; and that no funds may be provided for payment of salaries of private school teachers or employees, or for construction of facilities for private schools. 45 C.F.R. 116.20(e) provides generally that control of Federal funds granted pursuant to the application, and title to property acquired with such funds, shall not inure to the benefit of any private school but shall be in a public agency, and that administrative control of the projects shall be in the local public agency.

In the first year of operation under Title I, over 22,000 local projects were financed. Department of Health, Education, and Welfare, Office of Education, *First Annual Report, Title I, Elementary and Secondary Education Act of 1965*, at 13. These projects included remedial reading classes, school lunches, medical, dental and psychiatric services, field trips, summer day camps, training for teachers and staff, parental counseling, English classes for non-English speaking children, special tutoring, programs for the physically handicapped, language programs for the deaf, provision of additional teachers to reduce class size, and transportation services. See *First Annual Report, supra*, at 97-99, listing 22 "project areas" with 76 "examples of specific activities."

Under Title II of the Act, the Commissioner of Education is authorized to finance State programs for "acquisition of library resources (which, for the purposes of this subchapter, means books, periodicals, documents, audiovisual materials, and other related library materials), textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools in the State." 20 U.S.C. 823(a). The Act requires that title to these materials may vest only in a public agency, and that only materials approved for use in the State's public schools may be financed. 20 U.S.C. 825. In the regulations are restrictions designed to ensure that the public agency retains control over materials loaned for the use of private school children and teachers (45 C.F.R. 117.5); the regulations further require that these materials

not be used for religious instruction or worship (45 C.F.R. 117.4(c)). The Senate Report on Title II recognizes that "State plans regarding the administration of programs will vary from State to State." S. Rep. No. 146, 89th Cong., 1st Sess., at 23. One possibility suggested by the Committee was that some States might wish to establish "a central public depository within a school district or within an area to serve more than one school district from which all elementary and secondary school children and teachers could 'check out' library resources." *Ibid.*

2. Within this framework, there are at least four respects in which local programs under the Act can differ and which could, either singly or in combination, have constitutional significance.

(a) *Whether the federally-financed program takes place on or off sectarian school premises.* Appellants would apparently argue (see para. 9, J.A. 7a) that a public school teacher, paid with federal funds, could not conduct a class on the premises of a sectarian school without a resulting violation of the Establishment Clause, since in this context public authority is being used in a manner which supports the institutional authority of the sectarian school; but they concede that no unconstitutional consequences occur when the class is taught on public school property, even though pupils attending sectarian schools are released in order to attend the federally financed class. While this distinction may be relatively clear-cut as applied to the teaching of classes,²⁸ there could be a

²⁸ The present regulations recognize the distinction by restricting the uses for which public school personnel may be made available to non-public school facilities. 45 C.F.R. 116.19(e)

great deal of factual variation relevant to constitutional adjudication in the loan of equipment and library resources. Before the constitutional merits could be reached, a searching factual investigation of each local program would be required to determine the actual substance of the arrangements under which federally financed property is used on sectarian school premises.

(b) *Whether the federally financed program is an "educational" or a "welfare" program.* Appellants suggest that a federally financed program of teaching sectarian school children might be considered so close to the traditional educational function of the sectarian school as to constitute governmental establishment. On the other hand, they concede (para. 9, J.A. 7a) that federal provision of services such as school lunches, and medical and dental examinations, would be valid as general welfare measures, even though provided on the sectarian school property. Cf. *Everson v. Board of Education*, 330 U.S. 1. See also, Pfeffer, *Church, State, and Freedom*, 569-570 (1967 rev. ed.). The difficulty here is in determining whether a particular program is of an "educational" or a "welfare" nature. Many programs financed under Title I would appear to be on the borderline or to partake of both elements: speech therapy, guidance counseling and psychiatric services, and special classes for the deaf and physically handicapped. The test might be whether the particular program has traditionally been considered to be part of the function of a school rather than a welfare agency. But tradition and practice as to the types of

program offered by schools vary greatly among different localities.²⁹

(c) *Whether the sectarian school maintains its identity in connection with programs taking place outside its premises.* Title I authorizes "dual enrollment" programs. 20 U.S.C. 241e(a)(2). These programs—sometimes called "shared time"—provide that sectarian school pupils spend part of their time enrolled in a public school, taking public school classes. It has been argued that "the constitutionality or unconstitutionality under the First Amendment of shared-time education would depend upon how it is carried out in practice." Pfeffer, *Church, State and Freedom*, 579 (1967 rev. ed.). If, for example, a class is taught on public premises by a public school teacher, but all or most of the pupils come from the local sectarian school, it might be argued that the class is still too closely connected with the sectarian school. On the other hand, if the sectarian school pupils are genuinely intermingled with the public school student body during the time they spend taking classes at the public school, and the sectarian school authority is completely absent, it would be more difficult to attack the constitutionality of the program.³⁰ The degree of diffusion in a particular locality might determine constitutionality.

²⁹ 45 C.F.R. 116.19(e) provides that "Public school personnel may be made available on other than public school facilities only to the extent necessary to provide special services" designed to meet the special educational needs of educationally deprived children and "only where such services are not normally provided by the private school."

³⁰ "It has been argued that by relieving parochial schools of the necessity of purchasing expensive laboratory, gymnasium, home economics, and manual training equipment, the state is

(d) *Availability of alternative means to help educationally deprived children without aiding sectarian schools.* If a program is found to aid religion although designed to further a valid secular legislative purpose, the question would arise whether other means, not involving aid to religion, would suffice to achieve the purpose. See *McGowan v. Maryland*, 366 U.S. 420, 449-52; *Abington School Dist. v. Schempp*, 374 U.S. 203, 265 (Brennan, J. concurring); cf. *Sherbert v. Verner*, 374 U.S. 398, 406-409. The legislative purpose of the Elementary and Secondary Education Act of 1965—to help educationally deprived children of low-income families (20 U.S.C. 241a), including those attending sectarian schools—is clearly valid. Insofar as the Act might be considered to aid religion, determination of the adequacy of less direct programs may well depend on the circumstances of the particular school district or the State involved. For example, while a shared-time or dual-enrollment program—under which sectarian school pupils spend part of their day enrolled in a public school—might be the best way of meeting the problem, some States have restrictions that would undermine the adequacy of such an approach, as for instance, a ban on the public thereby according them substantial aid. In a sense this is true, but in receiving this aid the parochial schools are surrendering their pupils to the public schools for part of the school day.” Pfeffer, *Church, State, and Freedom*, 578 (1967 rev. ed.).

Federal regulations recognize the problem, by forbidding separation of classes on public facilities by school enrollment or religious affiliation, where there is joint participation in a project by public and private school children. 45 C.F.R. 116.19(d).

bussing of sectarian school pupils.³¹ In addition, some States have interpreted their constitutions to prohibit use of public school facilities for sectarian school classes;³² and several States have statutes which would prevent part-time enrollment of sectarian school pupils in public schools.³³ Here again, constitutional adjudication would require a searching investigation of the circumstances in each State and each local school district.

3. By setting forth some examples of how State and local programs under this Act may vary in significant respects, we do not mean to suggest that any particular factor or combination of factors would lead to a holding of unconstitutionality. This canvas suggests, rather, that there is an almost infinite number of gradations in the relationship between federal funds and sectarian schools, and a decision sustaining standing

³¹ *Opinion of the Justices of the Supreme Court of Delaware*, 216 A. 2d 668 (1966); *Visser v. Nooksack Valley School District*, 33 Wash. 2d 699, 207 P. 2d 198 (1949); *McVey v. Hawkins*, 364 Mo. 44, 258 S.W. 2d 927 (1953); *Matthews v. Quinton*, 362 P. 2d 932 (Alaska, 1961); *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 115 N.W. 2d 761 (1962); *Silver Lake Consolidated School District v. Parker*, 238 Iowa 984, 29 N.W. 2d 214 (1947); *Board of Education for Independent School District No. 52 v. Antone*, 384 P. 2d 911 (Okla., 1963).

³² See Katz, "Note on the Constitutionality of Shared Time," in *Religion and the Public Order*, 1964, at 91-94.

³³ See Pfeffer, *Church, State, and Freedom*, 578 (rev. ed. 1967):

"* * * In some states, laws require full time attendance on the part of all public school enrollees, other than those who are physically handicapped. In others, the amount of state aid public schools receive is determined by full time attendance, so that acceptance of parochial school students for part time instruction would impose a probably prohibitive additional financial burden on local public school districts."

in this case would not materially advance the resolution of the constitutional questions surrounding so many divergent patterns. For this reason we urge that this is not the area in which—still assuming that *Frothingham* is found to be merely a rule of judicial restraint—to permit suits by taxpayers. Since local programs under this Act vary greatly from district to district, it would be necessary in the course of broad-brush taxpayer suits like the present one to inquire into the formulation and administration of the plans by many local authorities. Litigation in the context of cumbersome factual inquiries into the practices of many jurisdictions is not a course calculated to achieve the reliable adjudication of constitutional questions.

Moreover, if we take the present suit as limited to the practices of the New York City Board of Education, there are still other difficulties which militate against according appellants standing. This suit was brought against federal officials; but, as we have seen, neither appellees nor any other federal officials have anything more than remote contact with the decisions on which the First Amendment questions may turn. To authorize roving taxpayer suits would presuppose an extremely detailed set of federal regulations and policing procedures that do not exist, and which, if instituted, would result in a substantial hindrance to the administration of programs under the Act and a frustration of the congressional intent to accord local authorities broad discretion in tailoring the programs to the individual needs of their localities.³⁴

³⁴ See note 22, *supra*, p. 42.

4. Even if it were only a matter of sound judicial policy, suits like the present one should be barred as inappropriate. Though the wisdom of the course we suggest seems clear, it would, perhaps, be more debatable if it foreclosed the possibility of judicial review of important constitutional questions. No such consequence would follow, however, from the conclusion we press. To be sure, a decision to bar taxpayer suits in this area would, as this case illustrates, preclude wide-ranging objections to unspecified programs by plaintiffs whose only legal position is indistinguishable from the interest of millions of others who have chosen not to sue. The very fact that to this very moment there is considerable confusion as to just what appellants wish to challenge emphasizes the desirability of this outcome. There is, however, a corollary: That there is no necessity for the federal courts to suffer such abstract and general suits, because there are other channels for review whereby persons more immediately and ascertainably affected can focus precisely on the aspects of certain programs which are alleged to injure them.

While this is not the occasion to exhaust the techniques for judicial review available to persons with a more direct interest than the widespread one of being a federal taxpayer, several readily appear. The Act itself explicitly provides for judicial review when the appellee Commissioner of Education has disapproved or suspended a State's plan or its participation in programs under Title I or Title II. See 20 U.S.C. 241k(a), 827(a). Thus, if the State failed to provide services for children attending sectarian schools or

provided them less than their statutory due on the ground that such services would violate the First Amendment, and the Commissioner disapproved the State plan as not complying with the Act, the State would be able to secure judicial review of the constitutional limitations on its participation by proceeding in the court of appeals. Such a route would be adequate to test many constitutional questions. See *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127.

Furthermore, many States permit their residents and taxpayers to challenge the action of the State or its subdivisions in conducting allegedly unconstitutional programs. Or, even, as in *Board of Education of Central School District No. 1 v. Allen*, 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, probable jurisdiction noted, No. 660, this Term, January 15, 1968, local public school boards may be able to contest as unconstitutional a program that would require the sharing of benefits with children in parochial schools.³⁵

If a public school teacher were assigned to duties in connection with parochial school children or facil-

³⁵ The Elementary and Secondary Education Act Amendments of 1967, Pub. L. 90-247, approved January 2, 1968, provide for a State plan in connection with Title III of the Act, and in this regard include a procedure for resolving disputes between the State and its local agencies when a local agency is dissatisfied with the State's action in passing on its application for approval of a federal grant. A petition for review may be filed in a United States court of appeals. Since the provisions of Title III (Supplementary Educational Centers and Services) with respect to providing services for children in private schools are similar to those in Titles I and II, this may provide an additional avenue for judicial consideration of these questions.

ities and he considered the program incompatible with the First Amendment, it is not difficult to imagine several contexts in which the constitutional merits could be litigated. Compare *Keyishian v. Board of Regents*, 385 U.S. 589; *Slochower v. Board of Education*, 350 U.S. 551. Moreover, establishment issues could be raised by one State officer, e.g. the Attorney General, authorized to protest the action of another State officer, e.g., the Education Commissioner, because of his participation or refusal to participate in a federal program. See, e.g., *Special District for Education and Training of Handicapped Children v. Wheeler*, 408 S.W. 2d 60 (Mo. 1966); *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 115 N.W. 2d 761 (1962). Insofar as federal constitutional issues were raised, the action between them would be reviewable by this Court. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22.

To confine review of programs under this Act to the types of proceedings suggested above would pit against each other the individuals or agencies who claim direct injury from a specific program and the State or local officials who are responsible for designing and administering that particular program. In light of the availability of these other recourses which permit more orderly and searching presentations of the constitutional questions involved, we submit there is no compelling reason for this Court to make an exception for taxpayers' suits like the instant one. The uncertainty surrounding the objectives of this litigation demonstrates why this taxpayer's suit characteristically fails to involve "such a personal stake in the out-

come of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions * * *." *Baker v. Carr*, 369 U.S. 186, 204.

CONCLUSION

If the Court agrees that a district court composed of three judges was not required to hear appellants' request for relief, the judgment of the district court should be vacated and the case remanded for entry of a fresh decree so as to permit appellants to perfect a timely appeal to the court of appeals. Should the Court find that its jurisdiction has been properly invoked, the judgment of the district court dismissing the complaint should be affirmed.

Respectfully submitted.

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Assistant to the Solicitor General.

ALAN S. ROSENTHAL,
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Attorneys.

JANUARY 1968.

JAN 29 1968

SUPREME COURT. U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and HELEN D. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare of the United States and HAROLD HOWE, 2d, as Commissioner of Education of the United States,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

AND

BRIEF OF

ROSE SPIRA, NOCHUM GOLDBERG, MOSHE HUTCHINSON, FAY BIENSTOCK, EVELYN FARKASH, EILEEN KELLEHER, VIOLA GRAVES, ISOLINA PEREZ, JOSEPH McDERMOTT, HAZELTINE LEWIS, JOSE MARTINEZ, MAJOR EDWARDS, VIVIAN KOKAKIS, THEOPHANIS GINIS, and BERTHA ZAHARAKOS, *AMICI CURIAE* IN SUPPORT OF APPELLEES.

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COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF ROSE SPIRA, NOCHUM GOLDBERG, MOSHE
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EILEEN KELLEHER, VIOLA GRAVES, ISOLINA PEREZ,
JOSEPH McDERMOTT, HAZELTINE LEWIS, JOSE MAR-
TINEZ, MAJOR EDWARDS, VIVIAN KOKAKIS, THEO-
PHANIS GINIS, and BERTHA ZAHARAKOS, FOR LEAVE
TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF
APPELLEES.

Pursuant to Rule 42 of the Rules of this Court, Rose
Spira, Nochum Goldberg, Moshe Hutchinson, Fay
Bienstock, Evelyn Farkash, Eileen Kelleher, Viola
Graves, Isolina Perez, Joseph McDermott, Hazeltine
Lewis, Jose Martinez, Major Edwards, Vivian Kokakis,

Theophanis Ginis, and Bertha Zaharakos, by their attorneys, Herbert Brownell and Thomas F. Daly, respectfully move this Court for leave to file the annexed brief as *amici curiae* in support of appellees herein. Appellees have consented to the filing of this brief. Although appellants gave their consent, they have stated it was conditioned on the *amicus* brief being submitted by December 30, 1967, which is thirty days prior to the time which has been allowed for the filing of appellees' brief.

The movants are parents and guardians of children who receive educational help under Title I of the Elementary and Secondary Education Act of 1965 (hereinafter "the Act") in programs which it is the purpose of appellants' lawsuit to have declared unconstitutional. The Act makes such aid available to all children who live in areas where low-income families are concentrated, whether the children are regularly enrolled in public or nonpublic schools, under programs of local public school boards. Under the Act, the local public school board determines where the programs it administers shall be conducted. The public school board in New York City has said that the children's educational needs require that it conduct programs of speech therapy, remedial reading, remedial arithmetic, and guidance counselling in the children's regular school environment.¹ There are also other Title I programs in which children regularly enrolled in religiously affiliated schools take part which the public school board in New York City conducts on the premises of public

¹ Affidavit of Herbert Brownell sworn to May 17, 1967, paragraph 2, which has been made part of the record on this appeal at the request of the Solicitor General.

school buildings. It is only the remedial programs for retarded children conducted on the premises of religiously affiliated schools which are challenged in this lawsuit, and these are the programs under which the children of the parents who ask leave to file the appended brief are benefited.

These children and others who also receive educational help on the premises of religiously affiliated schools are the only persons who will be directly affected by the outcome of this lawsuit. If appellants succeed, these children will be singled out, because they regularly attend schools having some religious affiliation, and deprived of the help Congress has made available to all children in poverty areas who need it. In order to receive the help in speech therapy, remedial reading, remedial arithmetic, and guidance counselling in the manner in which the public school board has determined the educational needs of the children require, these children would, on appellants' view of the Constitution, have to give up their enrollment in schools having a religious affiliation and become regularly enrolled in public schools or in private schools not having a religious affiliation.

The parents of these children do not believe that, where Congress has enacted public welfare legislation for all children without regard to their religious association, some children may be excluded by reason of their religious beliefs or affiliations. They believe that their rights under the First Amendment protect them and their children from being disqualified from receiving benefits under the Act because of their religious practices and associations. These parents also believe

that our constitutional law should not be changed to allow any person or group who does not have a direct interest in the matter to bring lawsuits seeking to deprive certain citizens, solely because of their religious beliefs and affiliations, of the benefits of our nation's general welfare programs. These rights are personal to them and therefore cannot be represented by the appellees.

These parents are vitally affected by the resolution of the question of standing to sue presented on this appeal. If the law is changed to allow any member of the public to bring into question before the courts the rights of certain other persons, solely because those persons have a religious association, to receive general welfare benefits which Congress has made available to all persons, these parents and their children, and other persons having religious associations, will be set apart from the rest of society as the only persons whose right to general welfare benefits may be so challenged.

For the reasons heretofore assigned, and upon the proposed *amicus* brief annexed hereto, it is respectfully requested that this motion for leave to file this brief be granted.

Dated, New York, New York
January 29, 1968

Respectfully submitted,

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Supreme Court of the United States

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE
FOR THE YEAR 1894
IN RESPONSE TO A RESOLUTION OF THE SENATE
PASSED MAY 15, 1894
AND
A RESOLUTION OF THE HOUSE OF REPRESENTATIVES
PASSED MAY 15, 1894
RELATIVE TO THE LANDS BELONGING TO THE UNITED STATES
IN THE TERRITORY OF ARIZONA

WASHINGTON:
GOVERNMENT PRINTING OFFICE:
1895.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

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FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK
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BRIEF OF

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Interest of the *Amici Curiae*

The *amici curiae* submitting this brief are parents and guardians of children who receive special educational help under Title I of the Elementary and Secondary Education Act of 1965 (hereinafter "the Act"), which makes such help available to all children who live in areas having high concentrations of low-income families. The children of the *amici curiae* are regularly enrolled in schools in New York City affiliated with the Jewish, Lutheran, Roman Catholic, and Greek Orthodox faiths. They receive special educational help in public-school programs conducted under the Act on the premises of their own schools as a result of a determination of their local public school board that the children's educational needs require that programs of speech therapy, remedial reading, remedial arithmetic, and guidance counselling, be conducted in the regular educational environment of the disadvantaged children.

The *amici curiae* oppose any change in the law of standing to sue which would permit persons who are not directly affected to bring lawsuits to deny certain persons, because of their religious associations and practices, the benefits of laws enacted by Congress for the general welfare. These parents are vitally affected by the resolution of the question of standing to sue presented on this appeal. If the law is changed to allow any member of the public to bring into question before the courts the rights of certain other persons, solely because those persons have a religious association, to receive general welfare benefits which Congress has made available to all persons, these parents and their children, and other persons having religious as-

sociations, will be set apart from the rest of society as the only persons whose right to general welfare benefits may be so challenged.

Statement of the Case

The complaint alleges that the appellees, who are the Secretary of Health, Education and Welfare and the Commissioner of Education of the United States, are causing appellants' rights under the free exercise and establishment clauses of the First Amendment to the Constitution to be violated by approving programs under the Act. Appellants claim that the appellees' approval of the programs to which they object constitutes compulsory taxation for religious purposes in violation of the free exercise clause and effects a contribution of tax-raised funds to the support of religious institutions in violation of the establishment clause.

The allegations of the complaint omit to state that funds available under the Act may not be used for religious worship or instruction (§ 605); that the purpose of the educational services provisions of the Act is to provide funds to add to the educational services available to all children in poverty areas in which, the Congress has found, children have special educational needs and there is a lack of local funds to provide adequate educational programs (Title I § 201); that the only recipients of funds under the Act are local public school boards (Title I §§ 202, 203, 205, 207; Title II §§ 202, 204); that the only programs for children attending nonpublic schools which may be supported by Title I funds are programs not already offered by the local schools which "contribute par-

ticularly to meeting the special educational needs of educationally deprived children" (§ 201); that it is an educational decision of the local public school board whether any particular program is conducted in the school the children regularly attend or at some other location and that the programs of the Board of Education of the City of New York which are given to non-public school children on the premises of their own schools are programs for children who are troubled in that they need speech therapy, remedial reading, remedial arithmetic, and guidance counselling (§ 205(a) (1), (2), affidavit of Herbert Brownell sworn to May 17, 1967, par.2);¹ that it is the public school board which hires teachers, establishes curricula, and makes every decision in implementing the programs, including the decision where any particular program of instruction is to take place (§ 205(a) (2); affidavit of Herbert Brownell sworn to May 17, 1967, par.2); and, with respect to Title II, that materials may be purchased only by a public school board and children and teachers are allowed only the use of the materials, which must be accounted for to the public school board (§ 205).

The complaint does not contain allegations at odds with any of these omitted facts; it is silent with respect to who receives federal funds, who is hired to do the teaching, the purpose of the Act, the nature of the programs for which federal funds may be used, the nature of the particular programs of the Board of Education of the City of New York referred to in the complaint,

¹ This affidavit is one of the affidavits which have been made part of the record herein at the request of the Solicitor General and were transmitted to the Clerk of this Court by the Clerk of the United States District Court for the Southern District of New York on November 27, 1967.

and who determines the location where any particular educational program is to be given. The only factual allegations of the complaint upon which appellants base their claim that their First Amendment rights have been contravened are allegations that instruction under Title I is provided and library materials under Title II are used "in sectarian or religious schools."

There is no allegation that any funds are being used, even indirectly, to support religious worship or instruction. Indeed, section 605 of the Act which prohibits any payment for those purposes is not even referred to by appellants or listed in the appendix to their brief as a relevant provision of the Act.

Appellants' complaint with respect to Title I is simply that certain educational services are provided as part of a public program to help all children in poverty areas on the premises of the schools in which the children are regularly enrolled, which in some instances are schools having religious affiliations, because the local public school board has decided for educational reasons that those particular programs should be conducted there. Similarly, with respect to Title II appellants' complaint is that some books and library materials are used on the premises of such schools.

Appellants are described in the complaint as citizens of the United States and of the State of New York who are federal taxpayers and qualified voters of the United States as well as residents and voters of the State of New York. One appellant is also described as a real property taxpayer in the State of New York, and another appellant is described as having children

regularly registered in and attending the elementary or secondary grades in the public schools of New York.

The complaint contains no allegations that the appellants have any religious or atheistic beliefs or that any child of the appellant described as a parent is eligible to receive any benefits under the Act or is in any way affected by the acts complained of. The only religious beliefs or associations involved in the case not those of the appellants but those of the particular persons the appellants seek to have declared ineligible to receive help.

The purpose of the Act is set forth in the Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 146, 89th Cong., 1st Sess. 4-5 (1965), as follows:

The purpose of this legislation is to meet a national problem. This national problem is reflected in draft rejection rates because of basic educational deficiencies. It is evidenced by the employment and manpower retraining problems aggravated by the fact that there are over 8 million adults who have completed less than 5 years of school. It is seen in the 20-percent unemployment rate of our 18- to 24-year-olds. It is voiced by our institutions of higher learning and our vocational and technical educators who have the task of building on elementary and secondary education foundations which are of varying quality and adequacy.

The Act itself provides in § 201, Title I:

DECLARATION OF POLICY

SEC. 201. In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in this title) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

Financial assistance of various kinds is provided for in the several Titles of the Act. This suit challenges Title I, under which financial assistance is provided to "local educational agencies", which are defined in § 601(f) of the Act as local public school boards or their equivalents, for the education of children of low-income families, and Title II, under which library resources, textbooks, and certain other instructional materials are provided to a state or to a local public school board for loan to children and teachers.

Title I provides in Section 205(a)(2) that in order to qualify for Title I funds, a local public school board must determine:

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who

are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;

"Dual enrollment" refers to the attendance of certain pupils at more than one school, and with respect to Title I it refers to sending children from the school in which they are regularly enrolled to a different school to receive certain educational services. "Mobile educational services and equipment" refers to the conduct of the public school boards' Title I programs under public school board administration and control on the premises of the school in which the children are regularly enrolled.

In no program under the Act is any money provided to any nonpublic school, educator, parent, or pupil. All Title I programs are programs of the public school board, administered by public school authorities. It is the local public school board which determines where any particular educational program takes place. It is the public school board which decides whether children who are regularly enrolled in nonpublic schools receive particular instruction at the school they regularly attend or at some other location. With respect to programs conducted by the Board of Education of the City of New York, to which appellants refer in paragraphs 10 and 11 of their complaint, it is not and cannot be disputed that it is the Board of Education of the City of New York which has decided that certain

programs of remedial instruction under Title I should be given at the schools the children regularly attend and that the Board's decision was based on the Board's determination that instruction at those locations is educationally more valuable than the same programs conducted elsewhere would be. Other Title I programs in which children regularly enrolled in nonpublic schools participate take place in public buildings.

The programs which the Board has decided should be conducted in the children's regular school environment are programs for children who are retarded in that they need speech therapy, remedial reading, remedial mathematics, and certain guidance counselling. In a "Statement by the Board of Education on Title I Proposals" of August 31, 1966, the Board said (affidavit of Herbert Brownell sworn to May 17, 1967, par. 2):¹

There can be no dispute that, if all the Title I programs were to be open to non-public school students during after-school hours only, these students would not be reached as well as their needs require. The Board's own experience in giving instruction of this character has demonstrated that the after-school centers are not as well attended as they should be by the students who need the most help. Moreover, the Board has learned by experience that remedial instruction by teachers specially assigned for the purpose should, to be as effective as possible, be carried on in fre-

¹ This affidavit is one of the affidavits which have been made part of the record herein at the request of the Solicitor General and were transmitted to the Clerk of this Court by the Clerk of the United States District Court for the Southern District of New York on November 27, 1967.

quent consultation with the regular class-room teachers of the children in question. Frequently, also, the children's records need to be looked at. All this would be difficult to manage in after-school centers, particularly when conducted on school premises other than the children's regular schools.

In addition to attacking the Act for allowing a local public school board to make such a determination with respect to Title I programs, appellants also challenge the use of books and library materials, by anyone, on the premises of religiously affiliated schools. Title II grants are made to states which submit to the Commissioner of Education a plan, as required in Section 203(a) of the Act, that:

(2) sets forth a program under which funds paid to the State from its allotment under section 202 will be expended solely for (A) acquisition of library resources (which for the purposes of this title means books, periodicals, documents, audio-visual materials, and other related library materials), textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools in the State, and (B) administration of the State plan, including the development and revision of standards relating to library resources, textbooks, and other printed and published instructional materials furnished for the use of children and teachers in the public elementary and secondary schools of the State, except that the amount used for administration of the State plan shall not exceed for the fiscal year ending June 30, 1966, an amount equal to 5 per centum of the amount paid to the State under this title for that

year, and for any fiscal year thereafter an amount equal to 3 per centum of the amount paid to the State under this title for that year;

(3) sets forth the criteria to be used in allocating library resources, textbooks, and other printed and published instructional materials provided under this title among the children and teachers of the State, which criteria shall—

(A) take into consideration the relative need of the children and teachers of the State for such library resources, textbooks, or other instructional materials, and

(B) provide assurance that to the extent consistent with law such library resources, textbooks, and other instructional materials will be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools in the State which comply with the compulsory attendance laws of the State or are otherwise recognized by it through some procedure customarily used in the State; . . .

Title II of the Act makes clear in Section 203(a) (5) that the materials available under that Title are limited to materials which will add to the educational resources of a particular locality and may not be used to supplant the materials made available at the state or local levels by public or private funds. Title II materials are selected solely by public-school authorities. They are purchased solely by public-school authorities, and Title II programs are administered solely by public-school authorities.

In this respect, Title II serves a completely different function from that of certain state statutes which

authorize the provision of textbooks to all children enrolled in public or private schools and are designed to provide the normally required textbooks to children enrolled in nonpublic as well as public schools. It is the purpose of Title II of the federal Act to enrich and add to the library and textbook resources locally available without supplanting any public or private responsibility with respect to the furnishing of the textbook materials normally required.

Title II also requires in Section 205 that title to the library resources, textbooks, and other materials shall vest only in a public agency and that the Title II materials shall be limited to those which have been approved by the state or local public agency for use in the public elementary schools of the state.

In neither Title I nor Title II is there any basis for sorting out children for different treatment on the basis of their religion.

Summary of Argument

There is no merit to appellants' contention that this case should be distinguished from *Frothingham v. Mellon*, 262 U. S. 447 (1923). In Point I below it is shown that, despite appellants' contention to the contrary, the Court's decision in that case rested squarely on the limitation of the Court's jurisdiction of Article III of the Constitution. Moreover, appellants' complaint sets forth no adverseness, which the Court has found indispensable to a determination of a constitutional question by this Court, as is demonstrated by the fact that they

fail to allege anything which would show any relation between the ruling they seek and any effect upon them of the acts of which they complain. It is no answer to the lack of adverseness for appellants to argue that the expense of litigation will deter frivolous claims; there are organizations which exist and receive ample financial support to foster particular ideas of how our society should be ordered. Furthermore, the authorities appellants rely upon to support their contentions that a federal taxpayer has standing to sue will not support them. The cases are all either examples of suits commenced by local taxpayers, whose interest in local expenditures was contrasted to the interest of the federal taxpayer in the federal treasury by this Court in *Frothingham v. Mellon*, or of suits by persons who are affected in a way quite different from having to pay the federal income tax. The commentators appellants rely on make clear that to have standing a plaintiff should be required to have an interest of his own in which he suffers a palpable injury. Appellants' attempt to discredit the decision in *Frothingham v. Mellon* by arguing that the Court ruled in that case that some violations of the Constitution are *de minimis* is, of course, a misreading of the case. The decision was not based on the proposition that there are violations of constitutional rights which are too small to be redressed. The decision in that case is that the interest of a taxpayer in the general funds of the federal treasury is too indefinite and remote to provide a basis for a claim that a taxpayer suffers legal injury because of an expenditure.

There is no factual basis for appellants' contention that there can be no suit to challenge the Act unless

federal taxpayers have standing to sue. As is shown in Point II below, there are not only state and local educational organizations which have greater claim to standing than the federal taxpayer, but also there are individuals who are directly affected by the operation of the Act.

Standing to sue under the religious freedom clauses of the First Amendment should never be allowed to federal taxpayers or members of the general public where the claim of constitutional invalidity is based upon the proposition that Congress in benefiting all members of the public generally has violated the prescriptions of the First Amendment because some members of the public have religious associations. The case where a benefit to religion depends upon the plaintiff's contention that some members of the public should be treated differently from other members of the public because of their religious affiliation is fundamentally different from a case in which an act of Congress by its terms bestows a benefit on religious institutions or treats persons having a religious affiliation differently from the general public. As is more fully set forth in Point III below, the First Amendment should protect members of society from being pointed out in lawsuits as associated with religious institutions by those who would seek to forestall their receipt of national public welfare benefits, solely because of their religious association, which Congress has made available to all members of society.

Furthermore, a federal taxpayer should not be allowed standing to sue without consideration of the

nature of the asserted constitutional violation and the relation of the plaintiff to it, for otherwise, as is shown in Point IV below, the constitutional questions presented to the Court will be framed to promote the legislative ideas of various persons and groups of how our society should be structured and will bear no relation to any injury to anyone.

I

Under all the Authorities, Appellants Lack Standing to Sue.

A. The Decision in *Frothingham v. Mellon* is Based Squarely upon the Limitation of Jurisdiction of Article III of the Constitution

Appellants contend that the only possible obstacle to their suit is the decision in *Frothingham v. Mellon*, 262 U.S. 447 (1923), and that that decision is not an obstacle because it does not state a Constitutional limitation and, that being so, this Court should not apply it to claims of First Amendment violations. Appellants contend that the doctrine of standing is a doctrine of self-restraint which is not based on the Constitutional limitation on the Court's jurisdiction.

While the Court has used the word "standing" in refraining from exercising its jurisdiction, it has also used the term in many decisions holding that it lacks jurisdiction because there is no case or controversy. As stated in *Barrows v. Jackson*, 346 U.S. 249 (1953), at 255:

The requirement of standing is often used to describe the constitutional limitation on the

jurisdiction of this Court to "cases" and "controversies." See *Coleman v. Miller*, 307 U. S. 433, 464 (concurring opinion). Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others.

In the instant case, as in *Frothingham v. Mellon*, *supra*, the taxpayers lack standing in the jurisdictional sense in that they are parties to no case or controversy, of which a direct personal interest in the outcome is a necessary ingredient. In *Baker v. Carr*, 369 U.S. 186, 204 (1962), the Court stated the nature of this direct interest as follows:

A federal court cannot "pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool Steamship Co. v. Commissioners of Emigration*, 113 U. S. 33, 39. Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

In *Frothingham v. Mellon*, 262 U.S. 447 (1923), this Court passed for the first time upon "the right of

a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid, and will result in taxation for illegal purposes . . .” 262 U.S. at 486. This Court held in a unanimous decision that the plaintiff alleged no direct injury and for that reason that the Court lacked jurisdiction. This decision is not that anyone’s Constitutional rights are too small to be redressed, as is suggested throughout appellants’ brief, but that the nature of a federal taxpayer’s interest in the general funds of the federal treasury, partly realized from taxation and partly from other sources, is too indirect to support a claim that a federal taxpayer is directly affected at all by reason of an expenditure from the federal treasury. The Court stated at page 487 of its opinion “[T]he effect upon future taxation, of any payment out of the funds, [is] so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.” The decision rests squarely on the Constitutional limitation, and the Court said plainly, in the portion of the opinion which appellants contend does not rest on jurisdictional grounds, at pages 488-489:

We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which

otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.

The *Frothingham* decision has been understood by the lower federal courts to be based on the constitutional limitations on the Court's jurisdiction. *E.g.*, *Reynolds v. Wade*, 249 F.2d 73 (9th Cir. 1957); *Buscaglia v. District Court of San Juan*, 145 F.2d 274 (1st Cir. 1944), cert. denied, 323 U.S. 793 (1945).

The Court has never intimated that the decision does not apply to challenges based upon the freedom-of-religion clauses of the First Amendment. On the contrary, in *Doremus v. Board of Education*, 342 U.S. 429 (1952), in which a state taxpayer challenged Bible-reading in a public school as a violation of the estab-

lishment clause of the First Amendment, the Court reiterated the rule, stating at page 433 that it had held "that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect," and stating at page 434:¹

[W]e reiterate what the Court said of a federal statute as equally true when a state Act is assailed: "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Massachusetts v. Mellon*, *supra*, at 488.

The reason for the Court's holding was stated as follows at pages 434-435:

[B]ecause our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not

¹ See also *Elliott v. White*, 23 F.2d 997 (D.C. Cir. 1928), in which the Court of Appeals of the District of Columbia held that under the *Frothingham* decision a taxpayer or citizen could not maintain a suit to enjoin the payment of salaries to chaplains of the Army and Navy as an establishment of religion.

matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be injured by the unconstitutional conduct. We find no such direct and particular financial interest here. If the Act may give rise to a legal case or controversy on some behalf, the appellants cannot obtain a decision from this Court by a feigned issue of taxation.

B. Appellants' Claim Sets Forth No Direct Injury and No Adversary Contest

The court has developed the rule that it will not decide Constitutional questions at the instance of one who is not "himself immediately harmed or immediately threatened with harm, by the challenged action", or where there is "a want of a truly adversary contest." *Poe v. Ullman*, 367 U.S. 497, 504, 505 (1961) (opinion of Justice Frankfurter).

Here there is, of course, no direct injury and no truly adversary contest, as is demonstrated by the fact that these appellants, who here seek to prevent federal educational aid programs from taking place on the premises of religiously affiliated schools, say they would allow the same help to be given to the same persons in a different location and that health, dental, and lunch aid may be given at any location. But while in the instant case they say that they have no objection to the latter, they are of course free to do a complete about-face and claim that such aid may be given only on the premises of nonpublic schools, and that public buildings may not be used for such purposes. Appel-

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lants may make any or all of these claims because there is no relation between any of them and any effect on the appellants. The provisions of the Act allowing public school boards to determine whether a particular program shall be conducted by "dual enrollment" or by "mobile educational services" are presented by the complaint in this lawsuit in such a way that adjudication upon their validity would take place in the most abstract kind of setting.

In *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339 (1892), the parties stipulated all the facts which, if disputed, might have served as the basis of a decision which did not require a determination of the Constitutional validity of a statute, prompting this Court to announce at pages 344-345 the following rule requiring adverseness:

The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest

and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

More recently the Court has said that the actual antagonistic assertion of rights to be adjudicated is "a safeguard essential to the integrity of the judicial process", and one which the Court has held to be "indispensable to adjudication of constitutional questions by this Court." *United States v. Johnson*, 319 U.S. 302, 305 (1943).

In the instant case, appellants are attempting to procure a determination that it is unconstitutional to conduct public educational programs or use public educational library materials on the grounds or in the buildings of religiously affiliated schools. Programs under Title I and Title II of the Act are the vehicles for appellants' attempt to procure the constitutional ruling they desire, and appellants have avoided setting forth any allegation which would show the nature of programs under the Act. They have omitted to set forth any factual allegations showing the purpose or administration of the Act or who receives funds made available by it or how the challenged conduct in any way impinges on their rights. It is difficult to imagine a complaint which better demonstrates the wisdom of the Court's policy of deciding only issues raised by the "actual antagonistic assertion of rights by one individual against another" as stated in *Chicago & Grand Trunk R. Co. v. Wellman*, *supra*, at 345.

Being unable to show any real adverseness, appellants advance the contention, as a reason why this court should take jurisdiction, that the case must have merit because the expense of litigation would deter the making of a frivolous claim. Apart from the startling suggestion that adverseness may be judged by such a standard, the contention is disingenuous, for there are many organizations which depend on, and are given, large sums in order to further the donors' particular ideas of how our society should operate.

C. Appellants' Authorities Will Not Support Their Contentions

Apart from contending that the *Frothingham* decision is not based upon the Constitution's jurisdictional limitations, appellants attempt to avoid the decision in *Frothingham v. Mellon* in several other ways. They refer to several decisions of this Court, both earlier and later than the *Frothingham* decision, as examples of cases in which, according to appellants, suits such as *Frothingham* were decided on the merits. Appellants' authorities will, however, not support their contention. In *Millard v. Roberts*, 202 U.S. 429 (1906), the Court treated the plaintiff as a taxpayer of the District of Columbia as it did in *Bradfield v. Roberts*, 175 U.S. 291 (1899), a case expressly distinguished in the *Frothingham* decision at page 486 as follows:

The case last cited [*Bradfield v. Roberts*] came here from the Court of Appeals of the District of Columbia, and that court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefore

subject to the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. *Roberts v. Bradfield*, 12 App. D. C. 453, 459-460.

Similarly, *Heim v. McCall*, 239 U.S. 175 (1915); *Hawke v. Smith*, 253 U.S. 221 (1920); and *Coyle v. Smith*, 221 U.S. 559 (1911); are actions challenging state expenditures and do not concern the nature of an individual's interest in expenditures from the federal treasury. And in *Wilson v. Shaw*, 204 U.S. 24 (1907), a suit by a taxpayer and citizen to enjoin the construction of the Panama Canal, the Court rested its affirmance of a dismissal of a demurrer to the bill in equity on "the general scope of the bill," stating, at page 31:

That generally speaking, a citizen may be protected against wrongful acts of the Government affecting him or his property may be conceded. That his remedy is by injunction does not follow. A suit for an injunction is an equitable proceeding, and the interests of the defendant are to be considered as well as those of the plaintiff. Ordinarily it will not be granted when there is adequate protection at law. In the case at bar it is clear not only that plaintiff is not entitled to an injunction, but also that he presents no ground for any relief.

The Court then went on to show that there was no basis for the plaintiff's claim, but the fact that it did so does not show that it ever considered that it had jurisdiction. In fact, the Court expressly warned at page 31:

Is it any more than an appeal to the courts for the exercise of governmental powers which belong

exclusively to Congress? We do not stop to consider these or kindred objections; yet, passing them in silence must not be taken as even an implied ruling against their sufficiency.

Nor do any of the cases cited at page 23 of appellants' brief have anything to do with a taxpayer's interest in disbursements from the federal treasury. *Cochran v. Louisiana Board of Education*, 281 U. S. 370 (1930), concerned a state expenditure. *Everson v. Board of Education* 330 U. S. 1 (1947), concerned a local expenditure authorized by a state statute, and *Adler v. Board of Education*, 342 U. S. 485 (1952), concerned a city taxpayer. *Wieman v. Updegraff*, 344 U. S. 183 (1952), concerned a state loyalty oath, and the appellants who invoked the jurisdiction of this Court were state employees to whom the courts of Oklahoma had forbidden the State to pay salaries in a suit originally commenced by state taxpayers. *Harper v. Virginia State Board of Elections*, 383 U. S. 663 (1966), concerned the right of a citizen of a state to vote without having to pay a poll tax. *Engel v. Vitale*, 370 U.S. 421 (1962), was a suit by parents of children whom a state caused to say a daily prayer, while *Baker v. Carr*, 369 U.S. 186 (1962), concerned the right of certain voters to have their votes given as much effect as the votes of others.

Nor will the writers referred to at page 31 of appellants' brief provide appellants substantial support. One of them, Professor Davis, in discussing the articles written by Professor Jaffe to which appellants refer, states at page 57 of the 1965 Pocket Part to 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 22.10, that the Jaffe articles are "vulnerable in their version of what

the law is." In discussing the rule of *Frothingham*, Davis states, *id* at page 64:

But the "tradition" and the "practice" in the Supreme Court are clearly the opposite of what Professor Jaffe assumes them to be. *He cites no case in which the Supreme Court has entertained an action brought to vindicate the public interest by a citizen having no legal interest of his own.* The Supreme Court has often, in a series of unanimous decisions, dismissed such actions, usually on the theory of lack of case or controversy under Article III of the Constitution.

At page 66 Professor Davis concludes:

Conclusion concerning Jaffe proposals. What the federal law of standing most needs is not a revolutionary rejection of the unbroken tradition and practice that a plaintiff to have standing must assert an interest of his own, whether or not a public interest is involved. What is most needed is a consistent instead of an uneven judicial practice of opening the judicial doors to a plaintiff who does have an interest of his own which is in fact adversely affected. The sound view was stated by the House and Senate Committees with respect to § 10(a) of the Administrative Procedure Act, that any person has standing who is "adversely affected in fact." The sound view was stated by the Supreme Court in its 1963 opinion in the Bantam Books case when it allowed standing because the plaintiffs "have in fact suffered a palpable injury."

- D. The Decision in *Frothingham v. Mellon* Was Not Based on the Proposition That the Asserted Violation of a Constitutional Right Was Too Small To Be Redressed**

Appellants also seek to avoid the decision in *Frothingham v. Mellon* by stating that the foundation of the

decision is a determination that "the injury to the plaintiff is 'minute' and therefore is subject to the adage *de minimis non curat lex*" (appellants' brief, page 12). The decision in *Frothingham v. Mellon* nowhere refers to any injury as "minute", and there is nothing in the decision which can be taken to say that there are violations of Constitutional rights too small to merit redress in the federal courts. Rather it was the nature of a taxpayer's interest in the general funds of the federal treasury that this Court found to be "minute and indeterminable." 262 U. S. at 487. It was because a federal taxpayer was not directly affected and not because the wrong charged was in any sense small that the Court lacked jurisdiction. That appellants' contentions are erroneous in this respect is shown by the opinion of this Court in *Abington School District v. Schempp*, 374 U. S. 203 (1963), holding that it was no defense that the religious practices complained of were minor encroachments but, as stated at page 224, "It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain."

The Court stated in *Doremus v. Board of Education*, 342 U. S. 449 (1952), that if a plaintiff shows the requisite financial interest to bring a taxpayer's suit, which a local taxpayer has with respect to local expenditures, it would not matter that his motive is a religious difference and not a monetary one. In the instant case appellants candidly state, at page 37 of their brief, that "they are not motivated by any desire to keep taxes down." Appellants claim they sue to prevent a pocketbook injury in order to raise their

First Amendment claim, but their allegations fail to set forth any financial interest in the general funds of the federal treasury which differs from the interest of any federal taxpayer in any expenditure.

There is no factual allegation to show that a decision in the case will have any financial effect on the appellants. Although it is contended that defendants' actions constitute the levying of a tax for religious purposes, there is no particular tax levied to support the programs under the Act, and the only federal tax which appellants allege they pay is the federal income tax. The funds which pay for the challenged programs are disbursed from the general funds of the federal treasury raised by various taxes, as well as by bonds and other means. There is no allegation that appellants' taxes are increased by reason of the expenditures of which they complain or that their taxes would be diminished if some programs were not conducted on the premises of nonpublic schools.

Appellants' only complaint is that funds of the federal treasury are being disbursed for an impermissible purpose, and the nature of appellants' interest in the federal treasury is no different from the interest which was the basis of the complaint in the *Frothingham* case. This Court did not hold that if the Maternity Act was unconstitutional, it was only a minor contravention of the Bill of Rights. It held that the nature of the relationship of any taxpayer to the general funds of the federal treasury is too tenuous to form the basis of a claim that the taxpayer is legally harmed, in any degree, by reason of a disbursement of the treasury's funds.

There is no anomaly in the fact that a local taxpayer has a more direct relation to local governmental expenditures than a federal taxpayer has to national expenditures. The establishment clause is not thereby made a dead letter as far as the Congress is concerned, for any act of Congress may be reviewed in any case in which a party is directly affected.

II

There is no Basis for Appellants' Contention That the Act Must go Unchallenged Unless Federal Taxpayers Have Standing to Sue.

It is contended on appellants' behalf that the Act should not be immune from judicial review, and of course it is not. For example, Title I and Title II contain sections providing for judicial review in a United States Court of Appeals where any State is dissatisfied with the final action of the Commissioner of Education with respect to the approval of the State's application or where the Commissioner withholds funds or notifies a state it is ineligible to participate for failure to comply with the provisions of the Act. Title I, § 211; Title II, § 207.

Moreover, there is a case now before the Court, *Board of Education of Central School District No. 1 v. Allen*, No. 660, in which probable jurisdiction has been noted, where suit was commenced by a local public school board to challenge the validity under the federal and New York Constitutions of a statute providing textbooks to children enrolled in nonpublic as well as public schools. Although that case

has not yet been decided, it is axiomatic that issues of federal Constitutional law may be raised in this Court only by persons having standing to sue. The appellant in that case is a public school board, and, if it is decided that it may raise in this Court the question whether the state statute involved in that case contravenes the establishment clause of the federal Constitution, it would appear that any of the local school boards which are local educational agencies under the Act would have a far better claim to standing to challenge the Act than federal taxpayers have.

Furthermore, it goes without saying that in addition, any persons who are directly affected may maintain a suit to protect their rights and procure a decision of a constitutional question if such a decision is necessary to the adjudication of their rights. This is not a statute where there is no one who can be directly affected by its administration. For example, the children of the *amici curiae* submitting this brief are very directly affected by the administration of the Act. They would be vitally affected by a school board's decision that, notwithstanding the determination by their local school board that speech therapy, remedial reading, remedial arithmetic, and guidance counselling should, in order to be educationally effective, be given on the premises of the school the children regularly attend, it will not be given there because the schools have some religious affiliation. Such a decision would mean that these children must either give up their enrollment in religiously affiliated schools in order to receive help as educationally valuable as that given other children or take part in the public welfare pro-

gram by receiving only educational aid that the public school authorities have decided is educationally inferior to the aid which children attending public and private schools without religious affiliations are eligible to receive.

For any of these reasons, it is not necessary to reconsider the decision in *Frothingham v. Mellon* in order to assure that it is possible to have judicial review of the statute which is the subject of this suit.

III

Standing to Challenge Acts of Congress Should not be Allowed to Members of the General Public Where it is Predicated Solely on the Assertion That National Welfare Legislation Aiding the General Public Without Regard to any of its Members' Religious Beliefs and Associations Will Impermissibly Benefit Religious Institutions by Including Within its Class of Beneficiaries Persons Having Religious Affiliations or Associations.

The only relation between the Act and any religious institution is that some members of the general public who are benefited are regularly enrolled in schools having a religious affiliation so that when a public school board decides to conduct certain programs in the children's normal school environment some children receive the help on the premises of such schools; there is no benefit to any religious institution except in so far as its members are benefited as members of the general public. Appellants do not contend that educational help under Title I and Title II may not be given to children who regularly attend religiously affiliated schools. Appellants do not dispute that the only aid which may be given under the Act is additional aid in the form of educational services and materials which add to what is regularly provided by the local public

and nonpublic schools and which contribute particularly to meeting the special needs of educationally deprived children. Nor do appellants dispute that funds disbursed under the Act are, as the Act requires, paid only to public school boards, which control and administer every aspect of every program and decide where any particular program is to be given, and that no funds are given to any religiously affiliated school, educator, pupil, or parent or are used for religious worship or instruction. Their only complaint is that the programs under the Act, which are undisputedly programs drawn up and administered by public school officials who establish and administer programs for all children in areas having concentrations of low-income families, are conducted in certain instances on the premises of the schools in which the children are regularly enrolled, which include religiously affiliated schools, and that some of the Title II materials are used on such premises.

The *amicus* brief of Protestants and Other Americans United for Separation of Church and State is simply factually incorrect in stating at page 13 that there are programs under the Act which are not under public control and that "the federal government ... is pouring its money into church institutions." The same brief is also factually incorrect at the same page in its outrageous suggestion that sending children to religiously affiliated schools is motivated by a "desire to escape racial integration." The religiously affiliated schools to which the parents submitting this brief send their children are open to and attended by children of all races and ethnic groups, and the parents submitting this brief include members of minority groups, including Negroes and Puerto Ricans.

The Act benefits children regularly enrolled in schools having a religious affiliation only as they are members of the general public and not as members of any religious faith. Certain remedial programs are given by the Board of Education of the City of New York on the premises of religiously affiliated schools because the Board considers that those programs should be conducted there, not for any reason related to the religious association of the school, but because it is the regular educational environment of the child who needs the particular remedial help in that environment. In the instant case there is no benefit to any religious institution unless it may be claimed that aiding persons who are associated with a religious institution as members of the general public in exactly the same way that other members of the general public are aided benefits a religious institution.

Thus in asking for an exception to the rule of *Frothingham v. Mellon* in this case, appellants seek to establish a doctrine that, although members of the general public may not as a rule maintain lawsuits challenging the constitutionality of acts of Congress, there should be one exception under which anyone may point to the religious affiliation of any other member of society and ask the courts to determine whether that religious affiliation should bar his fellow citizen from receiving benefits Congress has made available to all.

This is one reason why standing in this case is not like standing to challenge an act of Congress authorizing the construction of a cathedral, which the dissent-

ing judge below found indistinguishable. In the case of legislation authorizing the construction of a house of worship, a religious institution is benefited directly and separately from society at large, and not merely by reason of its members participating in national welfare programs under which benefits are available to all without reference to any religious affiliation. In challenging legislation authorizing the construction of such a building, it is not necessary for the plaintiff to assert the difference between some persons and others because of the religious association of some recipients of the governmental expenditure; the preferential support of religion is inherent in the legislation itself. In the instant case, however, there is nothing in the Act which benefits anyone except disadvantaged children. It is not possible to claim that religious institutions are supported by the Act without pointing to some of the children who are eligible to receive aid under it and stating that they have some religious association. It is not the statute that deals with any person as a member of any religious group; it is the persons bringing the suit who distinguish among recipients of the federal aid by reason of their religious associations. We submit that the First Amendment does not require that taxpayers be given standing to sue in such a case. On the contrary, we submit that the First Amendment protects the right of individuals to be free from the effect of lawsuits which could be commenced by anyone and which are based on their religious association and seek for that reason to place them in a different category from all other persons where the act of Congress under attack has not done so.

The safeguards of the religious freedom clauses of the First Amendment are not served by allowing some citizens to categorize other citizens as followers of religious practices or members of religious associations and to assert in the courts that by reason of that categorization they are ineligible to receive general public welfare benefits; on the contrary, such a claim should be the last case, rather than the first, in which a taxpayer is allowed to sue.

IV

If Standing to Sue is Allowed Without Consideration of the Nature of the Asserted Constitutional Violation and the Relation of the Plaintiff to it, Constitutional Questions Presented to the Court Will be Framed to Further Legislative Objectives Rather Than to Protect Legal Rights.

To date, cases involving standing to challenge a statute under the religious freedom clauses of the First Amendment have involved a consideration of the nature of the asserted Constitutional violation and the relation of the plaintiff to the asserted violation and, unless a proper showing is made, the statute may not be challenged.

For example, it has been settled by this Court that those who would assert a claim under the free-exercise clause must show that they have religious beliefs and how those religious beliefs have been infringed. *Abington School District v. Schempp*, 374 U. S. 203, 224 n. 9 (1963); *McGowan v. Maryland*, 366 U. S. 420 (1961).

In *McGowan v. Maryland*, *supra*, certain department store employees who had been convicted of violating a state Sunday-closing law attempted to challenge the constitutionality of the statute under the First Amendment, both as an infringement of the free exercise of religion and as an establishment of religion. Although it was beyond question that the employees were directly affected by the statute, this Court held that they had no standing to challenge the statute under the free exercise clause, stating at pages 429-430:

But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that "a litigant may only assert his own constitutional rights or immunities," *United States v. Raines*, 362 U. S. 17, 22, we hold that appellants have no standing to raise this contention. *Tileston v. Ullman*, 318 U. S. 44, 46. Furthermore, since appellants do not specifically allege that the statutes infringe upon the religious beliefs of the department store's present or prospective patrons, we have no occasion here to consider the standing question of *Pierce v. Society of Sisters*, 268 U. S. 510, 535-536. Those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights. Cf. *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 459-460; *Barrows v. Jackson*, 346 U. S. 249, 257. Appellants present no weighty countervailing policies here to cause an exception to our general principles. See *United States v. Raines*, *supra*. [Footnote omitted].

In the instant case, the complaint sets forth no allegations whatever with respect to appellants' religious beliefs and how those beliefs are infringed or how appellants are embarrassed or inhibited in the exercise or nonexercise of religion by a public school board's use of the physical facilities of religiously affiliated schools, as well as public schools, to carry out public programs of special educational help. Thus there is no showing of standing with respect to their free exercise clause claim.

Moreover, although this Court has stated that it is not necessary to allege how one's particular religious freedoms are infringed to have standing under the establishment clause, it has never suggested that it will allow a suit to be maintained without regard to the nature of the alleged infringement of the Constitution and how it affects the plaintiff. On the contrary, in *Abington School District v. Schempp, supra*, parents of children, who were directly affected by the recitation in their public schools of religious scriptures, had standing to assert a claim under the establishment clause, while in *Doremus v. Board of Education, supra*, state and municipal taxpayers showing no measurable disbursement of state or local funds had no standing to raise the same claim.

Here, appellants have not even set forth a colorable claim of establishment. It has been settled by this Court that the benefits of public welfare statutes may not be denied to some persons because of their religious beliefs or practices. *Sherbert v. Verner*, 374 U. S. 398 (1963); *Everson v. Board of Education*, 330

U. S. 1, 16 (1947). See, *Cochran v. Louisiana Board of Education*, 281 U. S. 370 (1930). There is not the slightest suggestion in the complaint how the conducting of educational programs by public school authorities in certain instances on the premises of religiously affiliated schools is claimed to be an impermissible establishment of religion, while conducting the same educational services for children regularly enrolled in religiously affiliated schools at a different location is not.

If challenges are to be allowed at the instance of those who are in no way affected by the practice of which they complain, the Constitutional questions presented to this Court will be tailored to further the objectives and views of particular groups who will not be limited in the relief they seek by the effect upon them of the asserted violations. For example, as we have shown above, the only aspect of the Act challenged by appellants is the use of the premises of religiously affiliated schools as the location at which some programs under the Act are carried out. Appellants do not object to giving aid under the Act to children who are regularly enrolled in religiously affiliated schools as long as the help is given on public premises or on private premises not having any connection with a religious institution. Appellants also allege in their complaint that they do not consider that services such as medical and dental care should be forbidden on the premises of religiously affiliated schools.

Under the rule of standing sought by appellants any other group having certain ideas of what portions

of the Congress' welfare legislation should be carried out will be equally free to pose, as a question of Constitutional law to this Court, their own legislative ideas of which members of our society should be excluded from receiving such benefits. Each statute will pose as many Constitutional questions as there are organized groups interested in amending the legislation in the courts, and the relief sought in those lawsuits will have no relation to any injury to anyone.

CONCLUSION

For the reasons set forth above the decision of the three-judge court should be affirmed or, in the alternative, the appeal should be dismissed.

Dated: January 29, 1968.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D.
HENKIN, FRANK ABRAMS, C. IRVING DWORK,
FLORINE LEVIN and HELEN L. BUTTENWEISER,
Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States,
and HAROLD HOWE, 2d, as Commissioner of Educa-
tion of the United States,

Appellees.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF OF NATIONAL JEWISH
COMMISSION ON LAW AND PUBLIC
AFFAIRS, AMICUS CURIAE.**

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HELEN D. BUTTENWEISER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States,
and HAROLD HOWE, 2d, as Commissioner of Education
of the United States,

Appellees.

ON APPEAL FROM A THREE JUDGE COURT IN THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK.

**MOTION OF NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS, FOR LEAVE
TO FILE A BRIEF AS *AMICUS CURIAE***

Pursuant to Rule 42 of the Rules of this Court, the National Jewish Commission on Law and Public Affairs, by its attorneys, Julius Berman, Reuben E. Gross, Sidney Kwestel and Marcel Weber, respectfully moves this Court for leave to file the annexed brief as *amicus curiae* in support of appellees herein. Appellees have consented to the filing of this brief. Although appellants gave their consent, they have stated it was conditioned on the *amicus* brief being submitted by December 30, 1967, which is thirty days prior to the extended time which has been allowed for the filing of respondents' brief.

The National Jewish Commission on Law and Public Affairs is a voluntary association whose purpose is to represent the position of the Orthodox Jewish Community on matters of public concern. This action, brought by seven taxpayers, seeks to enjoin the continued operation of the education programs under Titles I and II of the Elementary and Secondary Education Act of 1965. The Titles under attack provide for special educational services to educationally deprived children whether they attend public or non-public schools and textbooks and library materials for all school children. Many of the children being benefited by the programs under attack attend Orthodox Jewish parochial schools located throughout the United States. Recognizing the contribution of a healthy educational system to the welfare of a democratic society, the Commission firmly supports the advancement of educational opportunity for all American children, believing that all of society benefits when programs are developed which advance the educational growth of all school children.

The Commission is familiar with the arguments advanced on both sides in this appeal, and believes that there is a need for the additional commentary contained in the attached brief *amicus curiae*.

The Commission has involved itself with this area and the relationship thereto of the Principle of Separation of Church and State and believes that its views may aid the Court in its consideration of the issues presented in this appeal. It therefore respectfully requests permission to file the attached brief *amicus curiae*.

Respectfully submitted,

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REUBEN E. GROSS,
SIDNEY KWESTEL,
MARCEL WEBER,

Attorneys for Amicus Curiae.

MARVIN SCHICK,
Special Consultant.

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and HAROLD HOWE, 2d, as Commissioner of Education
of the United States;

Appellees.

**BRIEF OF NATIONAL JEWISH COMMISSION ON
LAW AND PUBLIC AFFAIRS, AMICUS CURIAE**

This brief is submitted on behalf of the National Jewish Commission on Law and Public Affairs and is joined in by the following organizations: **Agudath Israel of America; National Council of Young Israel; Poale Agudath Israel of America; Rabbinical Alliance of America; Torah Umesorah, The National Society of Hebrew Day Schools; and Union of Orthodox Jewish Congregations of America.**

Interest of the Amicus Curiae

The National Jewish Commission on Law and Public Affairs is a voluntary association whose purpose is to represent the position of the Orthodox Jewish Community on matters of public concern. The Commission is fully

committed to the preservation of constitutional rights for all Americans, particularly the Principle of Separation of Church and State, in the belief that thereby Americans of the Jewish faith, in common with all other Americans, will enjoy the blessings of liberty. Recognizing the contribution of a healthy educational system to the welfare of a democratic society, the Commission firmly supports the advancement of educational opportunity for all American children. We believe that all of society benefits when programs are developed which advance the educational growth of all school children. Accordingly, we submit this brief because the statute being challenged herein plays an important role in the continued growth and expansion of educational programs throughout the United States which are beneficial to all school children.

Statement of the Case

This is an action brought by seven taxpayers against the Secretary of Health, Education, and Welfare and the Commissioner of Education of the United States, to enjoin the continued operation of the education programs under Titles I and II of the Elementary and Secondary Education Act of 1965. The statute was overwhelmingly passed by Congress after many years of urgent pleas that the federal government take action to support elementary and secondary education throughout the country. The Titles under attack constitute two of the three major sections of the Act; they provide for special educational services to educationally deprived children whether they attend public or non-public schools and textbooks and library materials for all school children. The alleged constitutional defect asserted by appellants is that some of the services and materials which are provided under the statute are made available to the children on the premises of parochial schools. Thus, appellants contend that their First Amendment rights are infringed.

A special three-Judge District Court was convened and by a 2-1 vote dismissed the suit on the ground that the plaintiffs lacked standing to sue. An appeal was taken to this Court which noted probable jurisdiction.

Argument

The well-established restriction upon taxpayers' suits in federal courts is predicated upon wise and sound principles enunciated by this Court. This limitation, however, has not impeded persons whose constitutional rights are threatened from having access to the courts, as demonstrated by many previous decisions of this Court. Appellants have failed to advance any cogent arguments to justify any deviation from this sound and historic requirement of standing to sue.

POINT I

The Doctrine of *Frothingham v. Mellon* is a sound one and should be reaffirmed.

In 1923, this Court, in a unanimous decision, declared that a taxpayer, seeking to enjoin on constitutional grounds federal appropriations, lacked standing to sue because he could not prove that "he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). The Court recognized that a frivolous claim of injury should not thwart the will of the Congress. As Mr. Justice Sutherland said:

"If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money and whose validity may be questioned." 262 U.S. at 487.

This principle is as valid today as it was forty-five years ago, perhaps more so because of the many new federal programs designed to improve the living conditions of millions upon millions of Americans. Of most importance is the simple fact that it has not once proved to be a barrier to those whose rights have been truly threatened. During the past generation this Court has been especially sensitive to claims of violations of those fundamental freedoms implicit in a scheme of ordered liberty. Yet, this concern has not been hindered by the Court's continued adherence to *Frothingham v. Mellon*.

Thus, this Court, time and time again, has had occasion to rule upon alleged violations of the Establishment and Free Exercise clauses of the First Amendment, such as, the busing of parochial school children, *Everson v. Board of Education*, 330 U.S. 1 (1947); release time programs, *McColum v. Board of Education*, 333 U.S. 203 (1948) and *Zorach v. Clauson*, 343 U.S. 306 (1952); prayers and Bible reading in public schools, *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 U.S. 203 (1963); Sunday closing laws, *McGowan v. Maryland*, 366 U.S. 420 (1961); and the rights of Sabbath Observers, *Sherbert v. Verner*, 374 U.S. 398 (1963). These cases make it clear that if a party has a colorable claim of infringement of constitutional rights, he would have his day in court.

In contrast, the sparse complaint filed by appellants herein fails to set forth how the appellants have been injured and, most significantly, fails to state the manner in which the Establishment and Free Exercise clauses of the First Amendment have been violated.

The frivolous nature of appellants' claim of injury is manifested by the fact that they say nothing in their complaint about the challenged programs other than the bald assertion that federal funds are being "used to finance and aid, in whole or in part, instruction in reading, arith-

metic and other subjects and for guidance in sectarian or religious schools" (Complaint, Paragraph 13), and "for the purchase of textbooks and instructional and library materials for use in religious and sectarian schools" (Complaint, Paragraph 15). Not a single program in any locality is described. Surely, if the allegation of violation of constitutional rights had any merit, the appellants ought to be able to show how specific programs actually affect them. The conclusion is inescapable that the purpose of this lawsuit is not to protect the civil liberties of these taxpayers, but, rather, to broadly tarnish a major congressional enactment involving the appropriation of billions of dollars to help hard-pressed local educational systems and educationally disadvantaged children.

Were *Frothingham v. Mellon* overruled, it would open the door to a flood of similar frivolous attacks against all the important domestic legislation enacted by Congress. Certainly, it would be simple to draft a complaint, such as here, alleging that appropriations for the fight against poverty and indeed every program administered by the Department of Health, Education and Welfare and other federal agencies violate the constitutional rights of some taxpayers.

POINT II

Taxpayer suits against Federal Appropriations are not the appropriate way to protect First Amendment Rights.

This Court has been urged that, short of totally repudiating the doctrine of *Frothingham v. Mellon*, it should be limited to litigation not raising First Amendment freedoms. This argument is based on the concept that the rights enumerated in the First Amendment have been accorded a "preferred position" by this Court and are so fundamental to the preservation of a free society that courts should relax their jurisdictional requirements.

Were the Court to narrow the standing rule, as appellants urge, taxpayers who opposed federal programs would simply couch their taxpayer lawsuits in First Amendment terms. No matter what the purpose of the appropriation or the nature of the challenged program, a plaintiff will have little difficulty in claiming that at least one of his First Amendment freedoms is being curtailed. Indeed, if the argument of the appellants is accepted, every taxpayer's claim of violation of First Amendment freedoms will *ipso facto* constitute a case or controversy. Thus, as a practical matter, a rule excluding First Amendment cases from the standing requirement would be the equivalent of overruling *Frothingham v. Mellon*.

Moreover, by its very nature a taxpayer suit can assert no more than a claim—and, at that, a tenuous one—of economic injury. But First Amendment claims are not dollars-and-cents rights; the Amendment and the preferred position approach is designed to protect those whose substantive freedoms are being violated. The showing of some actual or potential injury to the claimant is thus at the heart of the “preferred position” approach, while the principle underlying the bar against taxpayer suits is that they do not involve any injury to the claimants, whether it be the First Amendment or otherwise.

Much has been made of recent decisions in which this Court has seemingly relaxed the standing requirement to permit judicial determination of substantive constitutional issues. These cases, however, fall directly within the “preferred position” doctrine which affords special protection to persons whose access to the political process is limited. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 (1938). In each of those suits the injury sustained by the claimant was direct and could not be redressed through ordinary political activity, thus necessitating a more permissive judicial attitude regarding the right to sue. Moreover, it is notable that in not one of these cases was the plaintiff a taxpayer.

NAACP v. Button, 371 U.S. 415 (1963), involved a Virginia statute aimed at stifling the NAACP's promotion through litigation of Negro rights. The law was struck down as a violation of the First Amendment freedoms of expression and association. This Court found that in Virginia, Negroes were unable to obtain a fair hearing before the state legislature and the adverse effect on the NAACP was both direct and substantial. In affirming the right of the NAACP to challenge the statute, Justice Brennan, speaking for this Court, underscored the political process factor:

"And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." (Emphasis supplied)

"For such a group, association for litigation may be the most effective form of political association." 371 U.S. at 430, 431.

Similarly, in *NAACP v. Alabama*, 357 U.S. 449 (1958), there was direct injury to the NAACP by virtue of an Alabama law compelling it to disclose its membership list as a condition of continued operations within the state. This Court upheld the NAACP's claim of violation of the Negroes' freedom of association and made it clear that because there was no political opportunity to countermand the injurious legislation, the standing requirement would not bar the suit:

"The principle [of Standing] is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court." 357 U.S. at 459 (emphasis supplied)

By the same token, in *Barrows v. Jackson*, 346 U.S. 249 (1953), a seller of real property to a Negro in violation of a restrictive covenant that he had signed was permitted

to rely on the Equal Protection clause of the Fourteenth Amendment as a defense against a damage claim brought by the original seller although it was the equal protection of the Negro that was being curtailed.

The recognition that state action against minority groups denies them the opportunity for effective political response was explicit in Justice Stone's formulation of the "preferred position" doctrine in *United States v. Carolene Products Co.*, *supra*, when he said:

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry." [Citations omitted] 304 U.S. at 153.

In sum, then, the cases of *NAACP v. Button*, *Barrows v. Jackson*, and *NAACP v. Alabama* heavily relied on by appellants are totally inapposite. First, they were not taxpayer suits. Second, they involved direct injury. And finally, the adversely affected parties were members of a minority group for whom it was well established that normal political activity could not be relied upon to repair the injury.

That the foregoing cases presented special circumstances for relaxing the Standing requirement was recognized by this Court in *McGowan v. Maryland*, 366 U.S. 420 (1961). *McGowan* involved an attack by department store employees against a state's Sunday-Closing Law as an infringement of the Establishment and Free Exercise clauses of the First Amendment. Although it was beyond question that the employees were directly affected by the statute, this Court held that they had no standing to challenge it under the free exercise clause:

"Those persons whose religious rights are allegedly impaired by the statutes are not without effective

ways to assert these rights. Cf. *NAACP v. Alabama*, 357 U.S. 449, 459-460; *Barrows v. Jackson*, 346 U.S. 249, 257." 366 U.S. at 430.

Nor can appellants derive any comfort from *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) wherein this Court rejected a challenge to the standing of a book publisher whose sales were threatened by anti-obscenity legislation and permitted him to assert that the statute infringed his freedom of expression. Unlike the taxpayers in the present suit, the injury to the publisher was both direct and substantial.

Obviously, too, the injury involved in *Baker v. Carr*, 369 U.S. 186 (1962) was of such a nature that it could not be remedied otherwise than by court action. The plaintiff's right to vote had been diluted by the refusal of the state legislature to reapportion itself. Thus, the voters' ability to engage in meaningful political activity had been restricted and limited. In finding that the voters had standing, this Court insisted upon a direct personal interest as a precondition to the right to sue:

"A Federal Court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' *Liverpool Steamship Co.-v. Commissioners of Emigration*, 113 U.S. 33, 39. Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing." 369 U.S. at 204.

In contrast to the aggrieved parties in the foregoing cases, the parties and organizations which have instituted the present litigation have had and continue to have ample opportunity to present their views to congressional bodies

and to the public and to take whatever political action they deem desirable in order to promote their position. They have also been able to have direct contact with the local public agencies that administer the Elementary and Secondary Education Act. Retention of the sound judicial policy against taxpayer suits will not foreclose these parties from meaningful opportunity to redress the alleged wrongs.

In conclusion, in each of the above cases in which the Standing rule was relaxed, the personal stakes of the litigants were substantial and direct as compared with the frivolous economic interest asserted by the appellants in this case. As the previous decisions show, this Court has given preference to the First Amendment, both with respect to jurisdictional and substantive constitutional questions and this is at it should be when the freedoms of Americans are under attack and there are no effective political means for redress of the adverse public policy. We submit that the wise policy against taxpayer suits should not be swept aside merely because a tenuous First Amendment assertion has been made.

POINT III

There is no colorable claim of violation of First Amendment Rights.

Assuming, *arguendo*, that *Frothingham v. Mellon* is to be overruled or limited to non-First Amendment claims, appellants would nevertheless be required—as in all litigation—to show how their interests were threatened, directly or indirectly.

It is reasonable and necessary that when taxpayers sue to enjoin expenditures, they show a direct nexus between the expenditures and the alleged violation of their constitutional freedoms. This the appellants have not even begun to do in this case, even if one accepts—which we do not—the flimsy allegations contained in the complaint.

We may safely assume that the sparseness of the complaint does not result from appellants' unwillingness to disclose information that would lend substance to the allegation that their rights are being infringed. There is no clear statement in the complaint as to how the funds spent to implement the challenged provisions of the federal aid to education law deprive the plaintiffs of *their* constitutional rights. Indeed, they explicitly concede that the programs under attack would be valid if conducted on the premises of public schools (Complaint, Paragraphs 9-11).

The less than tenuous link between expenditure of public funds and infringement of First Amendment freedoms is plainly exposed in the assertion that the free exercise of religion of the plaintiffs has been violated. Not a shred of evidence is presented to show that, directly or indirectly, patently or subtly, the appellants or anyone else are in the slightest way precluded from practicing their religion or coerced toward accepting a creed that is not their own by any program under the Elementary and Secondary Education Act. And of even greater importance is the blatant absence from the complaint of the incontrovertible facts with respect to the operation of the statute without which it is manifestly impossible to reach any substantive constitutional questions.

The programs being challenged here are clearly secular in their purpose and completely non-coercive; their primary—and secondary—effect is neither the advancement of religion nor its inhibition. The only recipients of funds under the Elementary and Secondary Education Act are local public school boards. Also left out is the fact that the purpose of the statute is to provide funds for special educational services in poverty areas where Congress has found that children receive a substandard education; that the funds available under the Act may not be used for religious worship or instruction; that the only programs for children attending non-public schools which may be

supported by Title I funds are those that are not already offered by the local schools; that it is the responsibility of the local public school boards to decide whether any particular program will be conducted in the schools the disadvantaged children regularly attend or at some other location; that it is the local public school authorities who hire teachers, establish curricula, and make every decision regarding implementation of the programs supported by the Act; that with respect to Title II, materials may be purchased only by a public school board; and that children are allowed only the use of the materials, which must be accounted for to the local public school board.

The complaint contains no allegations at odds with any of these omitted facts; it does allege that the appropriations under the Act "constitute governmental financing of religious groups and governmental action whose purpose and primary effect is to advance religion" (Complaint, Paragraph 16). But the omitted facts highlight the completely public purpose of the challenged programs.

The sole claim of constitutional injury to the appellants arises from the use of certain parochial school facilities which are regularly used by the educationally deprived school children who are the beneficiaries of public assistance. But how does the physical location of the place where the programs are held adversely affect the religious freedoms of the plaintiffs? The plaintiffs attempt to answer this trenchant question in the following *pro forma* allegations of their complaint:

"The determination and action of the defendants violate the First Amendment to the United States Constitution in that they constitute a law respecting an establishment of religion by reason of the fact that they effect a contribution of tax raised funds to the support of institutions which teach the tenets of a church and constitute governmental financing of religious groups and governmental action whose purpose and primary effect is to advance religion.

"The determination and action of the defendants violate the First Amendment to the United States Constitution in that they prohibit the free exercise of religion on the part of the plaintiffs and the class they represent by reason of the fact that they constitute compulsory taxation for religious purposes." (Complaint, Paragraphs 16, 17)

No explanation whatever is offered for their bald conclusion that their constitutional rights have been violated. To be sure, appellants believe that federal moneys are being spent on unconstitutional programs. Such a claim was squarely rejected by this Court in *McGowan v. Maryland*, *supra*:

"But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that 'a litigant may only assert his own constitutional rights or immunities,' *United States v. Raines*, 362 U.S. 17, 22, we hold that appellants have no standing to raise this contention." 366 U.S. at 429.

Certainly, the interest of the plaintiff department store employees in *McGowan* was far more direct and substantial than that of the plaintiffs here.

It is manifest that to substantiate a free exercise claim, a showing of coercion by government is required. As Justice Clark said for a majority of this Court in *Abington School District v. Schempp*, *supra*:

"The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." 374 U.S. at 222-23.

There is not even a hint in this complaint as to how the statute and practices under attack compel the plaintiffs in their religious practices.

Furthermore, there is also no colorable claim of violation of the Establishment clause. To be sure, this Court noted in *Abington School District v. Schempp, supra*, that "the requirements for standing to challenge state action under the Establishment Clause . . . do not include proof that particular religious freedoms are infringed." 374 U.S. at 224, footnote 9. But the Court went on to find that the parties challenging the statute were "directly affected."

"The parties here are school children and their parents, *who are directly affected by the laws and practices against which their complaints are directed.* These interests surely suffice to give the parties standing to complain." *Ibid.* (Emphasis supplied)

The parties here have totally failed to demonstrate a comparable interest in the statute and programs here under challenge.

Similarly, the test suggested by Justice Brennan in his concurring opinion in *Schempp* that Standing under the Establishment clause should be allowed to persons who "set at least a colorable claim of infringement of free exercise." (374 U.S. at 266, footnote 30) compels dismissal of the complaint here. Since, as we have seen, there is no colorable claim here of violation of the free exercise of religion, there is necessarily no colorable claim of violation of the establishment clause.

Nor do the plaintiffs meet the Standing test of *Baker v. Carr, supra*, briefly discussed previously in another connection:

"Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adversariness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions? This is the gist of Standing."

The Complaint does not set forth any "personal stake" of the appellants here other than the allegation that tax money is being spent on programs which they regard to be unconstitutional.

From the foregoing discussion, it is clear that, irrespective of *Frothingham v. Mellon*, the appellants have no standing to attack the federal aid to education statute. They have failed to show some adverse coercive effect as a result of the appropriation—the necessary predicate for a claim of violation of the free exercise of religion clause. By the same token, they have not shown the necessary basis for a claim of violation of the establishment clause—(1) they are not parents; (2) they do not allege a colorable claim of violation of their free exercise rights; and (3) they have failed to demonstrate a personal stake in the outcome of the litigation. In short, even the formal overruling or limitation of *Frothingham v. Mellon* would not give these taxpayers standing to sue to invalidate the challenged programs.

Thus, apart from the precedential barrier against taxpayer suits, the plaintiffs in this case have not presented a colorable claim of violation of their First Amendment rights sufficient to establish that a "case or controversy" exists.

POINT IV

The statute under attack promotes society's interest in providing quality education for all children.

We have demonstrated that the taxpayer-plaintiffs have failed to allege even a colorable claim of injury. On the other hand, the interest of government and society in promoting adequate educational opportunities for all school children is of major magnitude. As this Court declared in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954):

"Today, education is perhaps the most important function of state and local governments. Compulsory

school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship."

When these words were written the federal government played virtually no role in supporting education at the elementary and secondary school levels. Increasingly, however, it became evident that federal involvement at these levels was necessary. Despite increased expenditures, state and local governments have been unable to provide enough money to properly finance education. At the same time, it became apparent that schools throughout the country—both public and non-public—were not providing many school children with the special needs vital to their education.

The education program presented by President Johnson to Congress in early 1965 was designed to meet and remedy these serious problems. The proposed legislation, which was drafted after consultation with leading public education authorities who gave it their enthusiastic support, met with the approval of virtually every group concerned with education that testified before congressional committees. In a special message to Congress on January 12, 1965, President Johnson pointed out:

"One hundred years ago, a man with 6 or 7 years of schooling stood well above the average. His chances to get ahead were as good as the next man's. But today, lack of formal education is likely to mean low wages, frequent unemployment, and a home in an urban or rural slum.

"Poverty has many roots but the taproot is ignorance.

"Poverty is the lot of two-thirds of the families in which the family head has had 8 years or less of schooling.

"Twenty percent of the youth aged 18 to 24 with an eighth-grade education or less are unemployed—four times the national average.

"Just as ignorance breeds poverty, poverty all too often breeds ignorance in the next generation.

"Nearly half the youths rejected by Selective Service for educational deficiency have fathers who are unemployed or else working in unskilled and low-income jobs.

"Fathers of more than one-half of the draft rejectees did not complete the eighth grade.

"The burden on the Nation's schools is not evenly distributed. Low-income families are heavily concentrated in particular urban neighborhoods or rural areas. Faced with the largest educational needs, many of these school districts have inadequate financial resources." 111 Cong. Rec. 492, 500.

Congress responded to the situation by giving overwhelming approval to the Elementary and Secondary Education Act of 1965. It is this law which is under attack in this litigation.

As previously described, the allegedly unconstitutional programs are, in all respects, administered by public officials and no money goes to support, directly or indirectly, religious instruction or worship. But in addition to being under public control, the provided services are completely public in nature and have nothing to do with the regular educational programs conducted by parochial schools.

These services do not assist any church or sectarian institution. They help students in elementary and secondary schools, including those who attend parochial schools; they also are to the benefit of all of society.

Elementary and secondary education is the responsibility of government; the constitution of every one of the fifty states guarantees a free public education to the children of school age within the state. In fulfillment of this responsibility, public school systems are established and compulsory attendance laws are passed.

But government must do more than merely insure school attendance for all; the concept of public responsibility includes the obligation to provide quality education, in order to insure that the students develop their fullest potential and thereby maximize their contribution to society.

Education is a public responsibility of the first order. Children may receive their necessary secular instruction either at public or non-public schools. In such event, both of these school systems—public and non-public—provide a most meaningful public (or governmental) service. The non-public schools are entrusted with what today is perhaps the most crucial job of society, and, in doing this job, they are as legitimate as the schools operated and financed by the state. Their very existence, educational performance and utility provide the most cogent response to those who allege that parochial schools are church institutions, pure and simple. As Walter Lippman once put it, "A parochial school is an American school."

In much the same way that the governmental function with respect to public schools entails not only the fact of school attendance but also the quality of education of public school children, the government also has the responsibility of insuring that students who go to parochial schools receive quality instruction. The government must assure that the educational needs of parochial school children are properly satisfied. Accordingly, the educational standards established govern all schools; and the Doctrine of Separation of Church and State poses no barrier to the adoption of laws and regulations relating to the quality of education in the non-public schools. Thus, standards have been set regulating attendance, subjects taught, and length of the school day in parochial schools. By the same token, separation of church and state should not serve to obstruct the state's recognition of its responsibilities to parochial school children who are in need of special educational services. Remedial programs are indispensable concomitants of quality education, for which the state is responsible, whether children attend public or non-public schools; remedial programs are the state's guarantee that children with special needs and problems will be assisted toward becoming useful citizens in our complex and dynamic society. The services provided under the Elementary and Secondary Education Act of 1965 are designed to accomplish this end.

If we examine for a moment two of the educational programs that are challenged as unconstitutional when given to parochial school children at their regular school premises—remedial reading and psychological counseling—the substantial educational interest of society becomes apparent. Religion does not benefit when children are taught to read properly and are given guidance which helps them to solve their problems, but society does. These programs and the others that are being attacked here have nothing to do with sectarian instruction; their impact on parochial school attendance, if there is any, is much smaller than that of busing programs upheld by this Court in *Everson v. Board of Education*, *supra*. In the case of busing, public funds are being used to bring children to a place where they receive religious instruction and perhaps without the busing some children would not be able to attend the parochial school. Here the programs are completely secular in their conception, function, content, and administration. Their major impact is on children and on the society which to its own benefit recognizes its responsibility to guarantee quality instruction to all.

The social gains to be achieved as a result of the programs set up under the Elementary and Secondary Education Act, can be appreciated most clearly when applied to a particular educational institution which is eligible for assistance under the statute. The Beth Rachel School is the girls' division of the United Talmudical Academy, the largest Jewish day school in this country. It is located in Brooklyn, New York and, as a recent memorandum by the Principal of its general studies program indicates, society has a valid interest in providing special services to its students:

"At present, our school population is 1500 girls, kindergarten thru high school. Most of our children come from low-income families. The average family has 5.9 children. The families reside in the poverty areas of Williamsburgh and Crown Heights. Ten per cent of our enrollees consist of students who

have arrived in the United States within the last few years from overseas, most of them coming from Hungary, Israel, and South America. These children pose a special problem to our school. Under our present setup, we are not equipped to provide special classes or tutoring services to these immigrants and they must be placed in regular classes. In some cases, it may result that a twelve year old girl has to be placed in a second or third grade.

"To most of our children, English is a second language since they come from Yiddish-speaking homes and a Yiddish social environment. Many of our children are two or more years behind in reading and language. This causes a severe handicap in their educational development."

(Rabbi Hertz Frankel, Memorandum of December 6, 1967 to the National Jewish Commission on Law and Public Affairs.)

But it is argued that the needy children should go to the public school for the remedial assistance, that it is the use of parochial school facilities which taints the programs. The Beth Rachel School is one of the most eligible non-public schools in the entire nation for Title I assistance, yet for the entire 1966-1967 school year, these were the special services given on parochial school premises to the girls who needed help:

One remedial reading teacher—two days a week
 One remedial math teacher—three days a week
 One speech therapist—one day a week

For this school year, the following services are provided:

One remedial reading teacher—two days a week
 One speech therapist—one-and-a-half days a week
 One teacher for non-English speaking students
 —three days a week

It would defeat the entire concept of the Elementary and Secondary Act and negate the state's obligation to children who are in need of remedial services, if all remedial programs had to take place at the public school. In some areas there might not be public schools close to the schools attended by these children. In other cases, for one reason or another, parents would be unwilling to have their children go to the public school for a remedial program. But most importantly, for children who do need help, the best place to provide it is often the school where these children feel most comfortable. Remedial programs are likely to be most efficacious and economical when they do not require school children with educational problems to be walked or bused to another school.

Surely, a parochial school building may be used for the performance of a valid public function when public control is maintained, as it is in this case. Where society benefits and there is no support whatsoever of religious instruction—such as with respect to medical and dental programs provided on parochial school premises—there can be no objection to the use of a building merely because it also serves a sectarian function.

We submit that in view of the overriding public interest in guaranteeing proper educational opportunities for educationally deprived children, this Court should not permit individuals who are not injured to obstruct the operations of the Elementary and Secondary Education Act which is designed to promote this interest.

January, 1968.

Respectfully submitted,

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SUPREME COURT, U. S.

No. 416

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States,
and HAROLD HOWE, 2D, as Commissioner of Education
of the United States,

Appellees.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF OF UNITED AMERICANS
FOR PUBLIC SCHOOLS**

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of the United States,

Appellees.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF OF UNITED AMERICANS
FOR PUBLIC SCHOOLS**

United Americans for Public Schools, pursuant to Rules of this Court, respectfully applies to this Court for leave to file its annexed brief as an *amicus curiae* in support of Appellants in the above entitled action, on the following grounds:

1. Amicus Curiae has not been able to obtain consent of the parties herein within the time prescribed for filing briefs for the reason that its counsel, resident in California, was not able to review until now all the briefs on file to ascertain whether there is need for additional commentary. Having reviewed said briefs, it appears that there is such need and that the points raised in the annexed

brief will present additional points not yet raised and that will be helpful to the Court. The special considerations will more fully appear herein.

2. The question presented by the above entitled action is whether the appellants, having sued as federal citizens and taxpayers, assert a legally cognizable injury by alleging in their complaint that Title I and II of the Elementary and Secondary Education Act of 1965 authorizes, or is being applied to grant, support for religious establishments in contravention of the establishment and free exercise clauses of the First Amendment of the United States Constitution.

3. Interest of United Americans for Public Schools.

United Americans for Public Schools (formerly Californians for Public Schools) is a California non-profit corporation, formed in 1953 and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California with special reference to the public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members and to the public related and objective and educational facts and findings, with the object of preserving the purposes of public schools and of the said constitutions, and fostering adherence thereto and support thereof.

Its members, as citizens and taxpayers of the United States and of the State of California, are vitally concerned both personally and economically in the issues of the instant case. California, the most populous State in the Union, like the State of New York, the second most populous State, whose educational programs are here involved, has specific State Constitutional provisions prohibiting the use of public funds for the support of sectarian or denominational schools. *Calif. Const.*, Art. IX, Sec. 8; Art. IV, Sec. 30. Despite such constitutional prohibitions, and like New York, the State of California accepts on behalf of its citizens millions of dollars in fed-

eral aid to education, including aid to schools authorized under Title I and II of the Elementary and Secondary Education Act of 1965, the statute here involved. Like New York, under the statute (20 U.S.C. §§ 241 e and 822 (a) (2) and 822(a) (3)) and rules and regulations promulgated by the Department of Health, Education and Welfare, receipt of such aid for public schools is conditioned first, upon administration of the act by state-supported agencies, and second, upon equal participation in said aid by private, parochial and sectarian schools.

But, unless the judgment below be reversed and the rule of *Frothingham v. Mellon* (262 U.S. 447) be rejected or held inapplicable in at least this type of case, members of amicus curiae are, like the New York plaintiffs, entangled in an absurd anomaly. In order to pursue, as representatives of many California citizens, their federal constitutional rights under the First Amendment (much less their rights under the State Constitution), these members would be compelled to sue in the State Court to enjoin the appropriate state agency from channeling federal funds into sectarian schools. (Such a suit has been authorized and prepared, but not filed, by amicus curiae.) Should they prevail, theirs may be a hollow victory. Once the State were thus to deny to the private, sectarian schools these federal funds, the millions earmarked for their State's public schools might perforce be cut off by the Department of Health, Education and Welfare. Consequently, these citizen-taxpayers face an intolerable option. Either they forego enforcement of their personal, "preferred" constitutional rights under the First Amendment and their State Constitution, and thereby permit their State and Federal government thus to conspire to evade the general prohibitions of the First Amendment and the specific prohibitions in their State Constitution, or they deliberately create either second-class state public education or else increased state taxation to bring their State's public school system up to its prior, federally-financed standards, and all the meanwhile continuing to

bear without remedy their burden as federal taxpayers of federally-financed education in private, sectarian schools in other states, and all this, despite the adjudication that not only their personal State but their personal First Amendment rights are thus violated. Such an outrageous squeeze could hardly have been sanctioned by the Founding Fathers!

4. Reasons for submission of brief.

Movant has reason to believe that some vital questions of law, relevant to the issues herein, have not been fully covered therein. These include elaboration upon the economic interest of plaintiffs which give them standing to sue, and upon the implied overruling of the rule of *Frothingham v. Mellon*, in this type of civil liberty suit, and upon the doctrine of unconstitutional conditions.

It has not been feasible to present the instant motion at an earlier date due to the necessity for first determining the proposed arguments of all the parties.

It is respectfully requested on the above grounds that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

UNITED AMERICANS FOR PUBLIC SCHOOLS

By

HENRY C. CLAUSEN
Attorney for Movant,
February 21, 1968.

BRIEF

INTEREST OF THE AMICUS CURIAE

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Its members, as citizens and taxpayers of the United States and of the State of California, are vitally concerned both personally and economically in the issues of the instant case. California, the most populous State in the Union, like the State of New York, the second most populous State, whose educational programs are here involved, has specific State Constitutional provisions prohibiting the use of public funds for the support of sectarian or denominational schools. *Calif. Const.*, Art. IX, Sec. 8; Art. IV, Sec. 30. Despite such constitutional prohibitions, and like New York, the State of California accepts on behalf of its citizens million of dollars in federal aid to education, including aid to schools authorized under Title I and II of the Elementary and Secondary Education Act of 1965, the statute here involved. Like New York, under the statute (20 U.S.C. §§ 241(e) and 822(a)(2) and 822(a)(3)) and rules and regulations promulgated by the Department of Health, Education and Welfare, receipt of such aid for public schools is conditioned first, upon administration of the act by state-supported agencies, and second, upon equal participation in said aid, by private, parochial and sectarian schools.

But, unless the judgment below be reversed and the rule of *Frothingham v. Mellon*, (262 U.S. 447) be rejected or held inapplicable in at least this type of case, members of amicus curiae are, like the New York plaintiffs, entangled in an absurd anomaly. In order to pursue, as representatives of many California citizens, their federal constitutional rights under the First Amendment (much less their rights under the State Constitution), these members would be compelled to sue in the State Court to enjoin the appropriate state agency from channeling federal funds into sectarian schools. (Such a suit has been authorized and prepared, but not filed, by amicus curiae.) Should they prevail, theirs may be a hollow victory. Once the State were thus to deny to the private, sectarian schools these federal funds, the millions earmarked for their State's public schools might perforce but cut off by the Department of Health, Education and Welfare. Consequently, these citizen-taxpayers face an intolerable option. Either they forego enforcement of their personal, "preferred" constitutional rights under the First Amendment and their State Constitution, and thereby permit their state and the federal government thus to conspire to evade the general prohibitions of the First Amendment and the specific prohibitions in their State Constitution, or they deliberately create either second-class state public education or else increased state taxation to bring their state's public school system up to its prior, federally-financed standards, and all the meanwhile continuing to bear without remedy their burden as federal taxpayers of federally-financed education in private, sectarian schools in other states, and all this, despite the adjudication that not only their personal State but their personal First Amendment rights are thus violated. Such an outrageous squeeze could hardly have been sanctioned by the Founding Fathers!

STATUTE INVOLVED

The statutory provisions involved in this suit are Title I and II of the Elementary and Secondary Education Act of 1965.

QUESTION PRESENTED

Does plaintiffs' complaint pose a case or controversy within the purview of Article III of the Constitution of the United States?

STATEMENT OF THE CASE

Plaintiffs below, citizens and taxpayers of the United States and residents of the State of New York, filed their complaint to enjoin the use of federal funds to finance guidance services and instruction in reading, arithmetic and other subjects in religiously operated schools and to prevent the purchase of textbooks and other instructional material therefor, all as authorized by Title I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. Secs. 241(a)-241(l), 821-827. Plaintiffs challenged the constitutionality of said statute upon the grounds that they were being forced to be unwilling contributors to the support of church schools, in contravention of both the "establishment" and "free exercise" clauses of the First Amendment of the United States Constitution.

The District Court, in a two-to-one decision, dismissed the complaint, holding that plaintiffs could have had standing to sue only because they pay income taxes, and holding, under the authority of *Frothingham v. Mellon*, 262 U.S. 447, that the allegation of such taxpayer's interest could pose no "case or controversy" cognizable under Article III of the United States Constitution.

SUMMARY OF ARGUMENT

The Court below erred in holding that only plaintiffs' interests in the federal treasury by reason of payment of income taxes could give them standing to sue and that such interests were by nature *de minimis*, for several reasons.

First, considered solely as a judicially-noticed matter of economics, such interests are not *de minimis*. As representatives of many other New York taxpayers in the second most populous state, their combined representative fractional interest in the federal treasury is substantial and comes not merely from income tax payments but from payment of federal excise taxes and from indirect payment of a myriad of federal taxes through the correspondingly increased costs of goods and services they purchase.

Second, and more important, plaintiffs allege that their right of religious liberty have been infringed, and to force plaintiffs and the citizens they represent to pay any fraction, no matter how small, of their contributions to the federal treasury for the support of religious schools contravenes well-established constitutional principals of the separation of Church and State. The *de minimis* argument should have no application relative to enforcement of such liberties guaranteed by the First Amendment.

Third, as representative citizens of the State of New York, plaintiffs have a compelling economic interest in the support of their public school system. They each have a *measurable* interest in the amount of federal aid appropriated for their public school system. And beyond such an economic interest, they each individually have a personal interest in their rights guaranteed under their State and Federal Constitutions, in their *personal* rights to the free exercise of religion, and in their freedom from being compelled to support any religious school. Since federal aid to the New York school system is con-

ditioned, under the statute attacked, unconstitutionally, upon the payment of public funds to sectarian schools, payment being made by state-supported agencies, they perforce must petition this forum to cure their grievances. Otherwise, they have no adequate remedy, the right to which is also guaranteed by the First Amendment.

And finally, the reasons enunciated by this Court to support its holding in the *Frothingham* case do not apply here. Therefore, the reasons for the rule ceasing, the rule ceases, a conclusion borne out by other, analogous cases of this Court which impliedly hold that in the protected area of civil liberties, a citizen-suit like the one below is a cognizable case or controversy.

ARGUMENT

Preliminary

In view of the many decisions and their many concurring and dissenting opinions in the field of Separation of Church and State, and, indeed, in view of the recent furor aroused in plaintiffs' State over the abortive attempt to repeal the mis-named Blaine Amendment, one can hardly imagine a more controversial "controversy" than the issue posed by plaintiffs' complaint. And that is precisely the issue before this Court—is this a "case or controversy" cognizable under Article III of the Constitution of the United States. Amicus contends it is, and clearly so.

I. Plaintiffs, as Taxpayers, Have Sufficient Economic Stake in the Outcome of This Case to Give Them Standing to Sue.

Initially, amicus takes issue with the District Court's holding that plaintiffs could have standing to sue only because they pay income taxes, and that there is no measurable trace thereof in the federal treasury which finds its way into the unconstitutional appropriations, and hence

plaintiffs suffer no pocketbook damage. This is a rationale used by this Court in enunciating the rule in *Frothingham v. Mellon*, 262 U.S. 447, and the other cases cited by the District Court.

Amicus contends that perhaps this may have been so in the 1920's when *Frothingham* was decided, but it hardly fits this case at this time. It hardly fits the taxes, the tax rates and the economics of the 1960's. Presently applied, the rationale is wrong for two fundamental reasons.

First, plaintiffs sue not only in their own behalf but in behalf of other New York taxpayers similarly situated. Since they are citizens of the second most populous State in the Union, their combined income tax payments are substantial. Judging by the defeat on November 7, 1967 of a proposed new State Constitution, which attempted to eliminate a denial of public funds for non-public sectarian schools, it may well be that they represent three-fourths of the New York electorate. Furthermore, plaintiffs and those they represent pay excise taxes. And even more, plaintiffs and those they represent (as this Court perforce must judicially notice), pay myriad more hidden income and excise taxes indirectly by absorbing other persons' taxes through correspondingly increased costs of commodities and services they purchase. This is real pocketbook damage! In combination, all these payments certainly can be arithmetically computed to be a sizeable percentage of governmental income, and hence outgo.

Second, plaintiffs and those they represent have a measurable interest in the funds their State receives in federal aid for their public school system. But the statute under attack in 20 U.S.C. Secs. 241 (e) and 822 (a) (2) and 823 (a) (2) conditions receipt of federal aid for their public schools upon the State's undertaking to channel equal federal benefits to private, sectarian schools through State-supported agencies. These, we would contend on

the merits, are clearly unconstitutional conditions under both plaintiffs' State as well as under Federal Constitutions. As this Court recently held in *Sherbert v. Verner*, 374 U.S. 398, at page 404:

"It is too late in the day to doubt that the liberties of religion . . . may be infringed by the denial of or placing of conditions upon a benefit or privilege."

See also Note, "Unconstitutional Conditions," 73 Harv. L. Rev. 1595, et seq. Assuming so, New York State therefore is illegally transferring public funds to sectarian schools in sums certain, which sums should go only to public schools. The loss to the public schools of public funds so transferred is a *measurable* amount, in which plaintiffs, as New York taxpayers, have a *measurable* interest. Furthermore, were plaintiffs to pursue their State Court remedies to halt this unconstitutional transfer within their own State, the federal government, by operation of the statute and rules and regulations passed thereunder, would halt the flow of federal millions to public school aid. This is an additional economic interest which plaintiffs would pursue by seeking redress in the federal courts. And, were plaintiffs denied such a federal forum, as held below, and failed, for obvious reasons, to insist upon their constitutional rights, they would in effect be bargaining away these rights in exchange for a certain amount of federal millions; again a *measurable* economic interest.

But, finally, amicus contends that it matters little in terms of principle how much of plaintiffs' tax-bite goes to support sectarian schools. The First Clause of the First Amendment was not intended by the Founding Fathers to be conditioned in its enforcement upon the size of an unconstitutional levy. As Madison stated in his "Memorial and Remonstrance Against Religious Assessments", quoted by Justice Rutledge in *Everson v. Board of Education*, 330 U.S., at 65-66:

"Who does not see that the same authority which can establish Christianity, in exclusion of all other religions may establish with the same ease any particular sect of Christians, in exclusions of all other Sects. That the same authority which can force a citizen to contribute *three pence only* of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." (Emphasis Added.)

Thus, plaintiffs' rights under the First Amendment should not have a price tag. They are personal rights, which, when infringed by even an unmeasurable levy, still may be enforced in the federal courts.

II. Because Plaintiffs' Rights Under the First Clause of the First Amendment are Preferred, Personal Civil Rights Having Incalculable Value, Plaintiffs' Allegations That They Have Been Violated and That Plaintiffs Were and Are Damaged Thereby Suffice to Vest the Federal Court With Jurisdiction Under Article III.

Can there be any doubt that the duty devolves upon this Court to guard jealously "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment"? *Thomas v. Collins*, 323 U.S. 516, at 530. How then can the Court shirk this duty by its own self-made *Frothingham* rule? It is just not intellectually honest to perpetuate a rule which immunizes Congressional appropriations and also restrains the Court from striking down public appropriations which violate these indispensable freedoms. Such an anomalous result is not the rational construction to which the Fundamental Law is entitled. Nor is it consistent with the First Amendment itself. Where else but to this Court may citizens like plaintiffs effectively petition for redress of their civil right grievances, rights expressly guaranteed in the First Amendment? *Brotherhood etc. v. Virginia, ex rel Virginia State Bar*, 377 U.S. 1. Every right must have its remedy, and most especially, a constitutional right!

The fact is, however, that this Court has not shirked this duty in the area of such civil rights. Its decisions perforce impliedly suggest that plaintiffs do have standing to sue.

A. *The Frothingham Rule Does Not Apply to This Type of Citizen-Suit.*

The closest analogous cases amicus has found are the *Griffin* cases, *Griffin v. State Board*, 239 F. Supp. 560, *Griffin v. School Board*, 377 U.S. 218, and *Griffin v. Board of Supervisors*, 339 Fed. 2d 486. Each involved State appropriations to private schools that were designed to perpetuate school segregation. These various courts found the plaintiff there to have standing to sue "without question". In *Doremus v. Board of Education*, 342 U.S. 429, the Court applied the *Frothingham* rule, but expressly stated at page 431, "It is not charged that the practice required by the statute conflicts with the convictions of either mother or daughter." Why note the absence of such an allegation unless its presence would have given plaintiffs standing to sue? And where in *Engel v. Vitale*, 370 U.S. 421, or *School District of Abington v. Schempp*, 374 U.S. 203 is the direct, out-of-pocket injury? In truth, this last factor which the Court below held to be so determinative, is no longer a prerequisite to a suit to protect the preferred civil rights guaranteed by the First Amendment.

B. *The Reasons for the Frothingham Rule Do Not Apply to This Type of Case; Hence the Rule Should Not Apply.*

In *Frothingham v. Mellon*, 262 U.S. 447, the plaintiff brought suit as a taxpayer, alleging that by reason of a Congressional appropriation for maternal welfare, her future taxation would be increased and thereby her property would be taken without due process of law. The Court held that her complaint presented no issue, inasmuch as she suffered or was threatened with no direct in-

jury. Aside from the obvious distinctions that the case involved threatened "future" taxation and property rights under the due process clause, and not, as here, present taxation and not the preferred civil rights of the First Amendment, the reasons advanced in the opinion to support the *Frothingham* decision clearly have no applicability to our case.

First, the Court was concerned with the possible inconvenience to the Courts because a large number of appropriations otherwise could be thus attacked. Amicus submits that inconvenience would be no excuse for failure of the Court to enforce upon Congress the express limitations imposed upon it by the First Amendment, and indeed, in other fields, the Court willingly has assumed to honor and exercise this duty. Furthermore, the likelihood is small that a majority of Senators and Congressmen would in a multitude of instances violate, as they have here, the clear injunction, "Congress shall make no law . . ."

Second, the Court held that the taxpayer's interest in the moneys of the treasury was comparatively minute and indeterminable and was shared with millions, and his interest in future appropriations too remote and uncertain to appeal to the preventive powers of a court of equity. But the opposite is true here. Plaintiffs in their representative capacity represent millions of taxpayers. Furthermore, we are concerned with funds already appropriated, and with determinable, measurable sums, all as hereinbefore set forth. And finally, we contend it makes little difference however small may be plaintiffs' contributions to such appropriations, or whether, indeed, after a tracing it be found that they contribute none, and the slack be taken up by others. The First Amendment would condemn even a "three pence" contribution, by anyone.

Third, the Court invoked the doctrine of separation of powers, contending that the Court's power amounted

to "little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of enforcement of a legal right." (P. 488) But enforcement of "a legal right" is precisely what plaintiffs seek below. They have the legal, personal right, under both the Federal and their State Constitutions, to refuse to support sectarian schools with public funds, to compel their State-supported agencies to refuse to channel public funds to support sectarian schools, and to compel Congress to abide by the mandate to "make no law respecting the establishment of religion, or prohibiting the free exercise thereof", and, to promote the excellence of their public school system by receiving the benefits of federal public funds without the imposition upon such benefit of an unconstitutional condition as in *Sherbert v. Verner*, 374 U.S. 398, 404.

Because the reasons for the *Frothingham* rule no longer apply in this day of high taxes, great concern for public education, and enforcement of civil rights, the rule should no longer apply and should be swept away to join other dusty precedents long since discarded by this modern Court.

CONCLUSION

For the reasons foregoing, it is respectfully submitted that the order of the United States District Court for the Southern District of New York should be reversed and the case returned to the lower court for reconsideration on the merits.

Respectfully submitted,

HENRY C. CLAUSEN

Attorney for Amicus Curiae

MAR 11 1968

Supreme Court of the United States

October Term, 1967

JOHN F. DAVIS, CLERK

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELENE L. BUTTENWIESER,

*Appellants,**against*

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Appellees.

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Appellants,

against

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Health, Education and Welfare of the United States, and
HAROLD HOWE, 2d, as Commissioner of Education of the
United States,

Appellees.

REPLY BRIEF FOR APPELLANTS

I. Direct Appeal to this Court

For the first time in its brief addressed to the merits of this appeal, the Government has asserted that the case should not be here on direct appeal and that a three-judge court was not necessary in the first instance. Its explanation for this delay is that "the issues have been clarified by the appellants' presentation" (Government's brief, p. 5), and that in "their opening brief in this Court * * * appel-

lants have provided elaboration of the nature of their suit * * * (ibid., p. 10). We submit that there is nothing in our opening brief which adds substantively to, or in any way modifies, what we have stated in our complaint, briefs and oral argument before Judge Frankel, briefs and oral argument before the three-judge court, and in our Statement as to Jurisdiction in this Court.

It has been our position throughout the proceedings that the programs challenged are not authorized by the statute *and* that, if they are, the statute is unconstitutional. Such a case is properly heard by a three-judge court and appealable directly to this Court.

The thrust of the complaint in this case is the same as that in *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954). There, as here, the complaint alleged that regulations issued by a Government agency (there the Wage Stabilization Board) "are not authorized by statute, or that, if purporting to be so authorized, the statute violates the Federal Constitution" (ibid., p. 541). The case came to this Court on direct appeal from a three-judge court and was decided by this Court on the merits.

The Government's contention here was asserted in *Zemel v. Rusk*, 381 U.S. 1 (1965). The Court disposed of it in the following language (at 5-6):

* * * It is true that appellant's argument—that either the Secretary's order is not supported by the authority granted him by Congress, or the statutes granting that authority are unconstitutional—is two-pronged. But we have often held that a litigant need not abandon his nonconstitutional arguments in order to obtain a

three-judge court: "The joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene such a court."

In *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960), the Court said (at 76-77):

* * * Appellees concede that if the complaint had attacked §792 *solely* on the ground of conflict with the United States Constitution, the action would have been one required by [28 U.S.C.A.] §2281 to be heard and determined by a District Court of three judges. But appellees contend that because the complaint also attacks §792 on the ground of conflict with the Federal Agricultural Marketing Agreement Act of 1937 and the Secretary's Florida Avacado Order No. 69, it is possible that the action could be determined on the statutory rather than the constitutional ground, and, therefore, the action was not required to be heard by a District Court of three judges under §2281 and, hence, a direct appeal does not lie to this Court under §1253.

Section 2281 seems rather plainly to indicate a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality.

* * * (Emphasis in original.)

In *Lee v. Bickel*, 292 U. S. 415 (1934), the Court, in a unanimous opinion by Mr. Justice Cardozo, said (at p. 417):

The appellees, complainants in the court below, have brought this suit against the appellant, the comptroller of the state of Florida, to restrain the enforcement of a Florida statute for the levy and collection of stamp

taxes upon the documents described in the bill of complaint.

Their contention has been and is that the statute, properly construed, does not apply to the transactions stated in the bill, and that, if so applied, it is in conflict with the due process and commerce provisions of the Constitution of the United States. Amendment 14; art. 1 §8.

A District Court of three judges granted an interlocutory judgment (5 F. Supp. 720) which thereafter was made permanent. The case is in this court upon an appeal by the state comptroller. * * *

The Court took jurisdiction of the appeal and decided the case on the merits without ever reaching the constitutional issue. The Court said (at p. 425):

* * * The taxation of the documents being without warrant in the statute, there is no duty to determine whether the constitution would be infringed if the meaning were something else. * * *

In *Sterling v. Constatin*, 287 U. S. 378, 388-9 (1932), "complainants denied that the Governor, under the Constitution and statutes of the state, could lawfully exercise the authority he had assumed, and specifically alleged that, if any statute of the state conferred such authority, it contravened stated provisions of the Constitution of the state and the due process and equal protection clauses of the Fourteenth Amendment." This Court, in a unanimous opinion by Chief Justice Hughes, held that the case was properly heard by a three-judge court and decided on the merits a direct appeal to the Supreme Court. It said (at p. 393):

* * * As the validity of the provisions of the state Constitution and statutes, if they could be deemed to au-

thorize the action of the Governor, was challenged. The application for injunction was properly heard by three judges.

It is entirely reasonable and logical that an alternative allegation of a Federal agency's want of statutory authority should not negate the appropriateness of a three-judge court and a direct appeal to this Court. This is so because in a real sense such an allegation is unnecessary and hence surplusage. Few principles are more firmly established than that

* * * [w]hen the validity of an act of Congress is drawn in question and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Crowell v. Benson*, 285 U. S. 22, 62 (1932). Quoted in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 348 (1936) (concurring opinion of Mr. Justice Brandeis).

There are innumerable cases in which the Court has refused to pass on the constitutionality of a statute because the statute reasonably construed does not authorize the action challenged by the plaintiff.¹ Thus, in the present case, if the plaintiffs had alleged only that the Elementary and Secondary Education Act of 1965 was unconstitutional to the extent that it authorized use of Federal funds to finance instruction in or books for sectarian schools, can it be doubted that the Court would have first considered and

1. See, for example, *Lee v. Bickel*, *supra*; *Ex parte Endo*, 323 U. S. 283, 297 (1944); *Peters v. Hobby*, 349 U. S. 331, 338 (1955); *Kent v. Dulles*, 357 U. S. 116, 129 (1958); *Greene v. McElroy*, 360 U. S. 474, 507-8 (1959).

passed upon the question whether the Act does in fact authorize such use?

We have been unable to find a single case in which this Court dismissed a direct appeal from a three-judge court on the ground that the complaint alleged that if a statute authorized certain conduct the statute was unconstitutional. None of the cases cited in the Government's brief supports such a contention.

In *Kessler v. Department of Public Financial Responsibility Division*, 369 U.S. 153 (1962) (Government's brief, p. 9), the Court took jurisdiction of a direct appeal from a three-judge court.

In *Brown Shoe Company v. United States*, 370 U. S. 294 (1962) (Government's brief, p. 9), the question involved was the finality of the three-judge District Court decision. The Court held the decision to be final and accepted the appeal.

Thompson v. Whittier, 365 U.S. 465 (1961) (Government's brief, p. 9) was a *per curiam* dismissal of an appeal with no reason given for the dismissal.

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (Government's brief, p. 16), a single judge's determination was held proper because the action "did not contemplate injunctive relief" but only declaratory relief (372 U. S. at 155). In the present case, of course, the complaint prays for injunctive relief.

In *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939) (Government's brief, p. 17), a three-judge court was

held to have been inappropriate because the constitutional challenge was insubstantial. This is hardly the case here. The Government does not assert that the complaint herein does not raise a substantial constitutional question. Indeed, in view of the fact that the Court has noted probable jurisdiction, it is difficult to see how the Government could do so.

In *Phillips v. United States*, 312 U.S. 246 (1941) (Government's brief, p. 17) a three-judge court was held inappropriate because "the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law" (312 U.S. at p. 252), and because "an attack on lawless exercise of authority in a particular case is not an attack on the constitutionality of a statute conferring that authority even though a misreading of the statute is invoked as justification" (*ibid.*). Unlike the present case, there was no allegation that, if the Governor's action was authorized by state constitutional provision or statute, the latter would be violative of the Federal Constitution.

In *Ex parte Hobbs*, 280 U.S. 168 (1929) (Government's brief, p. 18) a single-judge court was held proper because, although plaintiff had raised a constitutional issue in his complaint, he elected not to pursue it but instead informed the judge that he conceded the constitutionality of the challenged administrative order, and the District Court judge issued an injunction based solely on the construction of the state statute and not on its constitutionality. This Court pointed out (at p. 172) that the dropping of the constitutional challenge did not divest the District Court

of jurisdiction since the complaint asserted diversity of citizenship as well as the constitutional ground.

Ex parte Bransford, 310 U.S. 354 (1940) (Government's brief, p. 18) held that a three-judge court was not required because the attack was not on the constitutionality of a statute but *solely* on "allegedly erroneous administrative action" (310 U.S. at 361). "The validity of the statute," the Court said (at p. 359), "is not involved." The inapplicability of *Bransford* to the present case is clear from the following sentence in the opinion (at p. 361):

*** Where by an omission to attack the constitutionality of a state statute, *its validity is admitted for the purposes of the bill*, a determination by the trial court that the assessment accords with the statute would result in the refusal of the injunction and the dismissal of the bill. (Emphasis added.)

In the present case the validity of the statute is not admitted, but vigorously contested; and if the Court finds that the appellees' actions accord with the statute, an injunction would not necessarily be refused and the complaint would not necessarily be dismissed.

Bailey v. Patterson, 369 U.S. 31 (1962) (Government's brief, p. 18) is likewise on its face clearly inapplicable. The Court said (at p. 33):

*** Section 2281 does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent.

In the present case, as we have noted, the Government does not contend that the claim of unconstitutionality is insubstantial.

International Ladies Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243 (1938) (Government's brief, p. 21) was a suit by an employer against a labor union for an injunction against picketing and boycott in a labor dispute. It was "not a suit to restrain the enforcement of an act of Congress, and no application was made for such an injunction" (304 U.S. at 247). The Government was not even a party to the suit.

Finally, *Moody v. Flowers*, 387 U.S. 97 (1967) (Government's brief, p. 21) held that a three-judge court is not appropriate where "the action seeks to enjoin a local officer" or where the complaint challenges the constitutionality of only a local law or city charter. Obviously, neither of these situations is present in this case.

In sum, not a single decision cited by the Government in its brief supports its assertion that a three-judge court and a direct appeal to this Court were improper in this case because the complaint asserts alternative grounds for injunctive relief, one of which is want of statutory authority and the other unconstitutionality. On the other hand, we have cited five decisions of the Court uniformly showing that they are proper.

In any case, we find it difficult to understand why the Government should raise the question at this late juncture. It is not as if this Court lacks jurisdiction to bypass the Court of Appeals, where this Court deems it to be in the public interest, even if the decision appealed from were that of a single judge. It has done so on a number of occasions. *United States v. United Mine Workers of America*, 330 U. S. 258, 269 (1947); *Norman v. Baltimore and O. R.*

Co., 294 U. S. 240 (1935); *Ex parte Quinn*, 317 U. S. 1, 19-20 (1942); *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330 (1935); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U. S. 937 (1952). Certainly an expeditious determination of the constitutionality of the Elementary and Secondary Education Act of 1965, under which many millions of dollars of Federal funds are being expended in support of sectarian schools, is in the public interest.²

In the last cited case, Justices Burton and Frankfurter dissented on the ground that this Court should have the benefit of the light that might be cast on the issues by a decision of the Court of Appeals. But with all due respect, it is hard to see how any substantial amount of additional light can be brought to bear by argument and decision in the Court of Appeals. The question of standing in this case has been briefed and argued before Judge Frankel and briefed and argued again before the three-judge court, in each case followed by a full decision and in the latter case a detailed dissenting opinion. It has been argued, as of this writing, in eight briefs *amici curiae* in this Court on both sides. It has been the subject of extensive hearings before a Senate Committee at which practically every leading constitutional authority either testified in person or submitted a written statement. It has been discussed in numerous law review articles. It is hardly too much to suggest that, if ever a constitutional question has been ripe for determination by this Court, the issue of standing in this case is such a one.

2. The *New York Times* of March 5 (p. 31) reports on a study of the use of funds under Title I of the Act for programs in sectarian schools in New Jersey. The study concludes, according to the *Times*, that the programs in half the schools involve aid to the institutions in violation of the Constitution.

II. The Commissioner's *Laissez-Faire*

We find it difficult to understand the Government's assertion that the U. S. Commissioner of Education neither exercises nor possesses any responsibility in respect to the manner in which state officials expend the Federal funds which he allocates to them. Almost every section of the Act indicates a Congressional intent to delegate to the Commissioner responsibility for assuring that the purposes and provisions of the Act are complied with. For the purposes of this appeal it is sufficient to cite the following:

Title I, Section 206 provides in part:

(a) Any State desiring to participate in the program of this title shall submit through its State educational agency to the Commissioner an application, in such detail as the Commissioner deems necessary, which provides satisfactory assurance—

* * *

(2) that, except as provided in section 207(b), payments under this title will be used only for programs and projects which have been approved by the State educational agency pursuant to section 205(a) *and which meet the requirements of that section*, and that such agency will in all other respects comply with the provisions of this title, including the enforcement of any obligations imposed upon a local educational agency under section 205(a); * * * (Emphasis added.)

Section 205(a) provides in part:

A local educational agency may receive a basic grant or a special incentive grant under this title for any fiscal year only upon application therefor approved

by the appropriate State educational agency, upon its determination (*consistent with such basic criteria as the Commissioner may establish—*

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * * (Emphasis added.)

On page 13 of its brief, the Government asserts that “neither the Act nor the regulations promulgated by the appellees express any preference on the question whether these services shall be provided on public, sectarian or even neutral premises.” Is there any way of interpreting this other than as an approval by the Commissioner of use of Title I funds “to finance and aid, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in sectarian and religious schools” as alleged in our complaint (J.A. 8a)?

Title II is no less direct. Its opening paragraph reads:

Sec. 201(a) The Commissioner shall carry out during the fiscal year ending June 30, 1966 and each of the four succeeding years, a program for making grants for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools.

The operative section, 203, reads in part as follows:

Sec. 203(a). Any State which desires to receive grants under this title shall submit to the Commissioner a State plan, in such detail as the Commissioner deems necessary, which—

* * *

(b) The Commissioner shall approve any State plan and any modification thereof which complies with the provisions of subsection (a).

On page 15 of its brief, the Government refers to a suit filed by counsel in this case in the New York Supreme Court as showing that the present case is really a suit against the city board of education rather than the Federal Government. An examination of the complaint in that case (a copy of which is being furnished to the Clerk of this Court for the Court's convenience) will show quite clearly why it was necessary to institute that suit. The Sixth Cause of Action (pp. 6-7) alleges that officials of the New York City board of education have exerted pressures upon public school teachers to agree to teach in sectarian schools. The Seventh Cause of Action asserts that the board of education has operated the Federal programs in such a way as to discriminate against children attending public schools. We obviously could not allege that these actions were authorized or approved by the United States Commissioner of Education or by the Elementary and Secondary Education Act of 1965, whose constitutionality is challenged in the present case. Had we asserted these causes of action in a Federal suit we would certainly have been met with a claim of abstention and necessity of exhausting state remedies. Finally, we call the Court's attention to the fact that the complaint in the state suit contains no cause of action based on Title II of the Elementary and Secondary Education Act of 1965.

III. *Frothingham* as a Jurisdictional Barrier

The major part of the Government's brief is devoted to supporting its contention that *Frothingham v. Mellon*, 262 U. S. 447 (1925), was decided on grounds of constitutional jurisdiction. We have, we believe, dealt adequately with this contention in our main brief, but we wish here to make one additional comment.

We concede in our brief that *Massachusetts v. Mellon*, 262 U. S. 447 (1925) may have been decided on constitutional grounds, but we note now that Mr. Justice Brandeis would not have agreed with that concession. In his classic concurring opinion in *Ashwander v. Tennessee Valley Authority*, 279 U. S. 288, 341 (1936), he said:

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operations. * * * In *Massachusetts v. Mellon*, the challenge of the federal Maternity Act was not entertained although made by the commonwealth on behalf of its citizens. (*Ibid*, pp. 346, 348. Emphasis added. Citations omitted.)

We point out that Mr. Justice Brandeis was a member of the Court which without dissent decided *Massachusetts v. Mellon* and *Frothingham v. Mellon* and therefore was in a position to know what the Court intended in those cases.

IV. The Complexities of the Issues

On pages 49-54 of its brief, the Government asserts that the complexity of the issues raised in the present case and the large variety of fact patterns that may be presented in taxpayer's suits under the Elementary and Secondary Education Act of 1965 make such suits impracticable and inappropriate.

We are unable to see how the legal issues and fact patterns are particularly complex and multifarious, nor why any other method of invoking judicial review would be more practicable or appropriate. In any event, the legal issues are certainly not more complex or the fact patterns more diverse than those involved in malapportionment suits which are quite analogous to taxpayers' suits in respect to the measurable quantity of the protagonist's interest. The experience since *Baker v. Carr*, 369 U. S. 186 (1962), indicates convincingly that the Federal judiciary has found quite manageable whatever practical problems may have arisen.

V. The AFL-CIO Brief *Amicus*

The briefs *amici curiae* in support of the appellees' position make substantially the same points as the Government's brief and therefore do not require additional response. One point in the brief *amicus* of the American Federation of Labor and Congress of Industrial Organizations does call for comment.

The AFL-CIO brief states (on p. 3):

The present suit attacks this Title II aid to private schools which are church-connected as violating the

establishment of religion clause. If the Court holds that the plaintiffs have standing to maintain this suit, and if they ultimately prevail on the merits, the solution of the church-connected school problem, which was worked out by the Congress only after years of travail and delay, will be invalidated. Further, the AFL-CIO believes that any holding banning all aid of any type to church-connected schools would probably destroy the entire program of federal aid to secondary and primary schools. It is the best judgment of the AFL-CIO that federal aid to education cannot be preserved at the present time, any more than it could be enacted in the first place, without the votes of some Congressmen who will not support a program which wholly excludes church-connected schools from all participation.

Presumably some, at least, of the plaintiffs, and of the organizations supporting them, do not wish to torpedo federal aid to education, but believe that it can be saved even if all aid to private schools is barred by court decree. The judgment, and experience, of the AFL-CIO is otherwise.

We believe that this imputation of a dog-in-the-manger attitude to the Congress is unfair and unjustified. It is one thing for some Congressmen to refuse initially to vote for a program of Federal aid to education which does not include sectarian schools in its coverage, and to insist that Congress leave the question of constitutionality to the courts.³ It is an entirely different matter to suggest that, once the courts have definitively decided that sectarian schools may not constitutionally be included in a program of Federal aid to education, the Congress will take the position that, if the sectarian schools cannot have it, neither

3. It is to this type of thinking that reference was made in the quotation in footnote 10 on p. 30 of the Government's brief.

will the public schools. By constitutional provision statute or judicial decision, every state in the Union forbids the type of aid to sectarian schools which is challenged in this suit. Yet none of the states has for that reason refused to support their public schools.

In any event, we believe it improper to submit the possibility that Federal aid to public education will not be forthcoming if the Constitution is complied with, as a ground for judicial consideration either in determining the merits or in deciding whether or not to assume jurisdiction.

Respectfully submitted,

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March, 1968

SUPREME COURT OF THE UNITED STATES

No. 416.—OCTOBER TERM, 1967.

| | | |
|--|---|--|
| Florence Flast et al., Appellants, v. Wilbur J. Cohen, Secretary of Health, Education, and Welfare, et al. | } | On Appeal From the United States Dis- trict Court for the Southern District of New York. |
|--|---|--|

[June 10, 1968.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

In *Frothingham v. Mellon*, 262 U. S. 447 (1923), this Court ruled that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. That ruling has stood for 45 years as an impenetrable barrier to suits against acts of Congress brought by individuals who can assert only the interest of federal taxpayers. In this case, we must decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment.

Appellants filed suit in the United States District Court for the Southern District of New York to enjoin the allegedly unconstitutional expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, 20 U. S. C. §§ 241a et seq., 821 et seq. (Supp. 1966). The complaint alleged that the seven appellants had as common attribute that "each pay income taxes of the United States," and it is clear from the complaint that the appellants were resting their standing to maintain the action solely on their status as federal taxpayers.¹ The appellees, who

¹ The complaint alleged that one of the appellants "has children regularly registered in and attending the elementary or secondary

are charged by Congress with administering the Elementary and Secondary Education Act of 1965, were sued in their official capacities.

The gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools. Such expenditures were alleged to be in contravention of the Establishment and Free Exercise Clauses of the First Amendment. Appellants' constitutional attack focused on the statutory criteria which state and local authorities must meet to be eligible for federal grants under the Act. Title I of the Act establishes a program for financial assistance to local educational agencies for the education of low-income families. Federal payments are made to state educational agencies, which pass the payments on in the form of grants to local educational agencies. Under § 205 of the Act, 20 U. S. C. § 241e, a local educational agency wishing to have a plan or program funded by a grant must submit the plan or program to the appropriate state educational agency for approval. The plan or program must be "consistent with such basic criteria as the [appellee United States Commissioner of Education] may establish." The specific criterion of that section attacked by the appellants is the requirement

"that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special

grades in the public schools of New York." However, the District Court did not view that additional allegation as being relevant to the question of standing, and appellants have made no effort to justify their standing on that additional ground.

educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate" 20 U. S. C. § 241e (a)(2).

Under § 206 of the Act, 20 U. S. C. § 241f, the Commissioner of Education is given broad powers to supervise a State's participation in Title I programs and grants. Title II of the Act establishes a program of federal grants for the acquisition of school library resources, textbooks, and other printed and published instructional materials "for the use of children and teachers in public and private elementary and secondary schools." 20 U. S. C. § 821. A State wishing to participate in the program must submit a plan to the Commissioner for approval, and the plan must

"provide assurance that to the extent consistent with law such library resources, textbooks, and other instructional materials will be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools in the State" 20 U. S. C. § 823 (a)(3)(B).

While disclaiming any intent to challenge as unconstitutional all programs under Title I of the Act, the complaint alleges that federal funds have been disbursed under the Act, "with the consent and approval of the [appellees]," and that such funds have been used and will continue to be used to finance "instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools" and "the purchase of textbooks and instructional and educational materials for use in religious and sectarian schools." Such expenditures of federal tax funds, appellants alleged, violate the First Amendment because "they constitute a law respecting an establishment of religion" and because

"they prohibit the free exercise of religion on the part of the [appellants] . . . by reason of the fact that they constitute compulsory taxation for religious purposes." The complaint asked for a declaration that appellees' actions in approving the expenditure of federal funds for the alleged purposes were not authorized by the Act or, in the alternative, that if appellees' actions are deemed within the authority and intent of the Act, "the Act is to that extent unconstitutional and void." The complaint also prayed for an injunction to enjoin appellees from approving any expenditure of federal funds for the allegedly unconstitutional purposes. The complaint further requested that a three-judge court be convened as provided in 28 U. S. C. §§ 2282, 2284.

The Government moved to dismiss the complaint on the ground that appellants lacked standing to maintain the action. District Judge Frankel, who considered the motion, recognized that *Frothingham v. Mellon, supra*, provided "powerful" support for the Government's position, but he ruled that the standing question was of sufficient substance to warrant the convening of a three-judge court to decide the question. 267 F. Supp. 351 (1967). The three-judge court received briefs and heard arguments limited to the standing question, and the court ruled on the authority of *Frothingham* that appellants lacked standing. Judge Frankel dissented. 271 F. Supp. 1 (1967). From the dismissal of their complaint on that ground, appellants appealed directly to this Court, 28 U. S. C. § 1253, and we noted probable jurisdiction. 389 U. S. 895 (1967). For reasons explained at length below, we hold that appellants do have standing as federal taxpayers to maintain this action, and the judgment below must be reversed.

I.

We must deal first with the Government's contention that this Court lacks jurisdiction on direct appeal be-

cause a three-judge court was improperly convened below.² Under 28 U. S. C. § 1253, direct appeal to this Court from a district court lies only "from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges." Thus, if the Government is correct, we lack jurisdiction over this direct appeal.

The Government's argument on this question is two-pronged. First, noting that appellants have conceded that the case should be deemed as one limited to the practices of the New York City Board of Education, the Government contends that appellants wish only to forbid specific local programs which they find objectionable and not to enjoin the operation of the broad range of programs under the statutory scheme. Only if the latter relief is sought, the Government argues, can a three-judge court properly be convened under 28 U. S. C. § 2282. We cannot accept the Government's argument in the context of this case. It is true that the appellants' complaint makes specific reference to the New York City Board of Education's programs which are funded under the challenged statute, and we can assume that appellants' proof at trial would focus on those New York City programs. However, we view these allegations of the complaint as imparting specificity and focus to the issues in the lawsuit and not as limiting the impact of the constitutional challenge made in this case. The injunctive relief sought by appellants is not limited to programs in

² This issue was not raised in the court below, and the Government argued it for the first time in its brief in this Court. The Government claims the inappropriateness of convening a three-judge court became apparent only as the issues in the case have been clarified by appellants. Because the question now presented goes to our jurisdiction on direct appeal, the lateness of the claim is irrelevant to our consideration of it. *United States v. Griffin*, 303 U. S. 226, 229 (1938).

operation in New York City but extends to *any* program that would have the unconstitutional features alleged in the complaint. Congress enacted § 2282 "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order." *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 154 (1963). If the District Court in this case were to rule for appellants on the merits of their constitutional attack on New York City's federally funded programs, that decision would cast sufficient doubt on similar programs elsewhere that confusion approaching paralysis would surround the challenged statute. Therefore, even if the injunction which might issue in this case were narrower than that sought by appellants, we are satisfied that the legislative policy underlying § 2282 was served by the convening of a three-judge court, despite appellants' focus on New York City's programs.

Secondly, the Government argues that a three-judge court should not have been convened because appellants question not the constitutionality of the Elementary and Secondary Education Act of 1965 but its administration.³ The decision in *Zemel v. Rusk*, 381 U. S. 1 (1965), is dispositive on this issue. It is true that appellants' complaint states a nonconstitutional ground for relief, namely, that appellees' actions in approving the expenditure of federal funds for allegedly unconstitutional pro-

³ The Government also seems to argue that, if any administrative action is suspect, it is the action of state officials and not of appellees. For example, the Government describes federal participation in the challenged programs as "remote." Briefs for the Government, p. 17. The premise for this argument is apparently that, under 20 U. S. C. § 241e, programs of local educational agencies require only the direct approval of state officials to be eligible for grants. However, appellees are given broad powers of supervision over state participation by 20 U. S. C. § 241f, and it is federal funds administered by appellees that finance the local programs. We cannot characterize such federal participation as "remote."

grams is in excess of their authority under the Act. However, the complaint also requests an alternative and constitutional ground for relief, namely, a declaration that, if appellees' actions "are within the authority and intent of the Act, the Act is to that extent unconstitutional and void." The Court noted in *Zemel v. Rusk, supra*, "[W]e have often held that a litigant need not abandon his nonconstitutional arguments in order to obtain a three-judge court." 381 U. S., at 5-6. See also *Florida Lime Growers v. Jacobsen*, 362 U. S. 73 (1960); *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535 (1954). The complaint in this case falls within that rule.

Thus, since the three-judge court was properly convened below,⁴ direct appeal to this Court is proper. We turn now to the standing question presented by this case.

II.

This Court first faced squarely⁵ the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in a federal court in *Frothingham v. Mellon, supra*, and that decision must be the starting point for analysis in this case. The taxpayer in *Frothingham* attacked as unconstitutional the Maternity Act of 1921, 42 Stat. 224, which established a federal program of grants to those States which would undertake programs to reduce maternal and infant mor-

⁴ An additional requirement for the convening of a three-judge court is that the constitutional question presented be substantial. See *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U. S. 713 (1962); *Ex parte Poresky*, 290 U. S. 30 (1933). The Government does not dispute the substantiality of the constitutional attack made by appellants on the Elementary and Secondary Education Act of 1965. See *Flast v. Gardner*, 267 F. Supp. 351, 352 (1967).

⁵ In at least three cases prior to *Frothingham*, the Court accepted jurisdiction in taxpayer suits without passing directly on the standing question. *Wilson v. Shaw*, 204 U. S. 24, 31 (1907); *Millard v. Roberts*, 202 U. S. 429, 438 (1906); *Bradfield v. Roberts*, 175 U. S. 291, 295 (1899).

tality. The taxpayer alleged that Congress, in enacting the challenged statute, had exceeded the powers delegated to it under Article I of the Constitution and had invaded the legislative province reserved to the several States by the Tenth Amendment. The taxpayer complained that the result of the allegedly unconstitutional enactment would be to increase her future federal tax liability and "thereby take her property without due process of law." 262 U. S., at 486. The Court noted that a federal taxpayer's "interest in the moneys of the Treasury . . . is comparatively minute and indeterminable" and that "the effect upon future taxation, of any payment out of the [Treasury's] funds, . . . [is] remote, fluctuating and uncertain." *Id.*, at 487. As a result, the Court ruled that the taxpayer had failed to allege the type of "direct injury" necessary to confer standing. *Id.*, at 488.

Although the barrier *Frothingham* erected against federal taxpayer suits has never been breached, the decision has been the source of some confusion and the object of considerable criticism. The confusion has developed as commentators have tried to determine whether *Frothingham* establishes a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled.*

*The prevailing view of the commentators is that *Frothingham* announced only a nonconstitutional rule of self-restraint. See, e. g., Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 302-303 (1961); Arthur Garfield Hays Civil Liberties Conference: *Public Aid to Parochial Schools and Standing to Bring Suit*, 12 Buffalo L. Rev. 35, 48-65 (1962); Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353, 386-391 (1955). But see Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess., 465, 467-468 (1966) (statement of Prof. William D. Valente). The last-cited hearings contain the best collection of recent expression of views on this question.

The conflicting viewpoints are reflected in the arguments made to this Court by the parties in this case. The Government has pressed upon us the view that *Frothingham* announced a constitutional rule, compelled by the Article III limitations on federal court jurisdiction and grounded in considerations of the doctrine of separation of powers. Appellants, however, insist that *Frothingham* expressed no more than a policy of judicial self-restraint which can be disregarded when compelling reasons for assuming jurisdiction over a taxpayer's suit exist. The opinion delivered in *Frothingham* can be read to support either position.⁷ The concluding sentence of the opinion states that, to take jurisdiction of the taxpayer's suit, "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." 262 U. S., at 489. Yet the concrete reasons given for denying standing to a federal taxpayer suggest that the Court's holding rests on something less than a constitutional foundation. For example, the Court conceded that standing had previously been conferred on municipal taxpayers to sue in that capacity. However, the Court viewed the interest of a federal taxpayer in total federal tax revenues as "comparatively minute and indeterminable" when measured against a municipal taxpayer's interest in a smaller city treasury. *Id.*, at 486-487. This suggests that the petitioner in *Frothingham* was denied standing not because she was a taxpayer but because her tax bill was not large enough. In addition,

⁷ "Although the Court in the latter part of the opinion used language suggesting that it did not find the elements of a justiciable controversy in the case, the case in its central aspect turns on the application of the judicially formulated [*i. e.*, nonconstitutional] rules respecting standing." Hearings on S. 2097, *supra*, n. 6, at 503 (statement of Prof. Paul G. Kauper).

the Court spoke of the "attendant inconveniences" of entertaining that taxpayer's suit because it might open the door of federal courts to countless such suits "in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned." *Id.*, at 487. Such a statement suggests pure policy considerations.

To the extent that *Frothingham* has been viewed as resting on policy considerations, it has been criticized as depending on assumptions not consistent with modern conditions. For example, some commentators have pointed out that a number of corporate taxpayers today have a federal tax liability running into hundreds of millions of dollars, and such taxpayers have a far greater monetary stake in the Federal Treasury than they do in any municipal treasury.⁸ To some degree, the fear expressed in *Frothingham* that allowing one taxpayer to sue would inundate the federal courts with countless similar suits has been mitigated by the ready availability of the devices of class actions and joinder under the Federal Rules of Civil Procedure, adopted subsequent to the decision in *Frothingham*.⁹ Whatever the merits of the current debate over *Frothingham*, its very existence suggests that we should undertake a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits.

III.

The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to

⁸ See, e. g., Hearings on S. 2097, *supra*, n. 6, at 493 (statement of Prof. Kenneth C. Davis); Note, 69 Yale L. J. 895, 917, and n. 127 (1960).

⁹ Judge Frankel's dissent below also noted that federal courts have learned in recent years to cope effectively with "huge litigations" and "redundant actions." 271 F. Supp. at 17.

the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine.

Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question,¹⁰ when the parties are asking for an advisory opinion,¹¹ when the question sought to be adjudicated has been mooted by subsequent developments,¹² and when there is no standing to maintain the action.¹³ Yet it remains true that

¹⁰ See, e. g., *Commercial Trust Co. v. Miller*, 262 U. S. 51 (1923); *Luther v. Borden*, 7 How. 1 (1849).

¹¹ See, e. g., *United States v. Fruehauf*, 365 U. S. 146 (1961); *Muskrat v. United States*, 219 U. S. 346 (1911).

¹² See, e. g., *California v. San Pablo & T. R. Co.*, 149 U. S. 308 (1893).

¹³ See, e. g., *Tileston v. Ullman*, 318 U. S. 44 (1943); *Frothingham v. Mellon*, 262 U. S. 447 (1923).

"[j]usticiability is . . . not a legal concept with a fixed content of susceptible or scientific verification. Its utilization is the resultant of many subtle pressures . . ."
Poe v. Ullman, 367 U. S. 497, 508 (1961).

Part of the difficulty in giving precise meaning and form to the concept of justiciability stems from the uncertain historical antecedents of the case and controversy doctrine. For example, Mr. Justice Frankfurter twice suggested that historical meaning could be imparted to the concepts of justiciability and case and controversy by reference to the practices of the courts of Westminster when the Constitution was adopted. *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 150 (1951) (concurring opinion); *Coleman v. Miller*, 307 U. S. 433, 460 (1939) (concurring opinion). However, the power of English judges to deliver advisory opinions was well-established at the time the Constitution was drafted. 3 Davis, *Administrative Law Treatise* 127-128 (1958). And it is quite clear that "the oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions." Wright, *Federal Courts* 34 (1963).¹⁴ Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III. See *Muskrat v. United States*, 219 U. S. 346 (1911); 3 Johnston, *Corre-*

¹⁴ The rule against advisory opinions was established as early as 1793, see 3 Johnston, *Correspondence and Public Papers of John Jay* 486-489 (1893), and the rule has been adhered to without deviation. See *United States v. Pruehauf*, 365 U. S. 146, 157 (1961), and cases cited therein.

spondence and Public Papers of John Jay 486-489 (1893) (correspondence between Secretary of State Jefferson and Chief Justice Jay). However, the rule against advisory opinions also recognizes that such suits often "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U. S. 146, 157 (1961). Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

Additional uncertainty exists in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations. And a policy limitation is "not always clearly distinguished from the constitutional limitation." *Barrows v. Jackson*, 346 U. S. 249, 255 (1953). For example, in his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 345-348 (1936), Mr. Justice Brandeis listed seven rules developed by this Court "for its own governance" to avoid passing prematurely on constitutional questions. Because the rules operate in "cases confessedly within [the Court's] jurisdiction," *id.*, at 346, they find their source in policy, rather than purely constitutional, considerations. However, several of the cases cited by Mr. Justice Brandeis in illustrating the rules of self-governance articulated purely constitutional grounds for decision. See, e. g., *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *Fairchild v. Hughes*, 258 U. S. 126 (1922); *Chicago & Grand Trunk R. Co. v.*

Wellman, 143 U. S. 339 (1892). The "many subtle pressures"¹⁵ which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours.

It is in this context that the standing question presented by this case must be viewed and that the Government's argument on that question must be evaluated. As we understand it, the Government's position is that the constitutional scheme of separation of powers, and the deference owed by the federal judiciary to the other two branches of government within that scheme, presents an absolute bar to taxpayer suits challenging the validity of federal spending programs. The Government views such suits as involving no more than the mere disagreement by the taxpayer "with the uses to which tax money is put."¹⁶ According to the Government, the resolution of such disagreements is committed to other branches of the Federal Government and not to the judiciary. Consequently, the Government contends that, under no circumstances, should standing be conferred on federal taxpayers to challenge a federal taxing or spending program.¹⁷ An analysis of the function served by standing

¹⁵ *Poe v. Ullman*, 367 U. S. 497, 509 (1961).

¹⁶ Brief for the Government, p. 7.

¹⁷ The logic of the Government's argument would compel it to concede that a taxpayer would lack standing even if Congress engaged in such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects. See *Flast v. Gardner*, 271 F. Supp. 1, 5 (1967) (dissenting opinion of Frankel, J.). The Government professes not to be bothered by such a result because it contends there might be individuals in society other than taxpayers who could invoke federal judicial power to challenge such unconstitutional appropriations. However, if as we conclude there are circumstances under which a taxpayer will be a proper and appropriate party to seek judicial review of

limitations compels a rejection of the Government's position.

Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of "the most amorphous [concepts] in the entire domain of public law."¹⁸ Some of the complexities peculiar to standing problems result because standing "serves, on occasion, as a shorthand expression for all the various elements of justiciability."¹⁹ In addition, there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.²⁰

Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to

federal statutes, the taxpayer's access to federal courts should not be barred because there might be at large in society a hypothetical plaintiff who might possibly bring such a suit.

¹⁸ Hearings on S. 2097, *supra*, n. 6, at 498 (statement of Prof. Paul A. Freund).

¹⁹ Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 Stan. L. Rev. 433, 453 (1962).

²⁰ Thus, a general standing limitation imposed by federal courts is that a litigant will ordinarily not be permitted to assert the rights of absent third parties. See, e. g., *Heald v. District of Columbia*, 259 U. S. 114, 123 (1922); *Yazoo & Miss. Valley R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217 (1912). However, this rule has not been imposed uniformly as a firm constitutional restriction on federal court jurisdiction. See, e. g., *Dombrowski v. Pfister*, 381 U. S. 479, 486-487 (1965); *Barrows v. Jackson*, 346 U. S. 249 (1953).

have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U. S. 186, 204 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.²¹ Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question.²² A proper party is demanded so that federal courts will not be asked to decide "ill-defined controversies over constitutional issues," *United Public Workers v. Mitchell*, 330 U. S. 75, 90 (1947), or a case which is of "a hypothetical or abstract character," *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 240 (1937). So stated, the standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits, *Chicago & Grand Trunk R. Co. v. Wellman*, *supra*, or those which are feigned or collusive in nature, *United States v. Johnson*, 319 U. S. 302 (1943); *Lord v. Veazie*, 8 How. 251 (1850).

²¹ This distinction has not always appeared with clarity in prior cases. See Bickel, Foreword: The Passive Virtues, The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 75-76 (1961).

²² One contemporary commentator advanced such an explanation for the holding in *Frothingham*, suggesting that the standing rationale was simply a device used by the Court to avoid judicial inquiry into questions of social policy and the political wisdom of Congress. See Finkelstein, Judicial Self-Limitation 338, 359-364 (1924).

When the emphasis in the standing problem is placed on whether the person invoking a federal court's jurisdiction is a proper party to maintain the action, the weakness of the Government's argument in this case becomes apparent. The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," *Baker v. Carr*, *supra*, at 204, and whether the dispute touches upon "the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co. v. Haworth*, *supra*, at 241. A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs. There remains, however, the problem of determining the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that imparts the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III.

IV.

The various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated. We have noted that, in deciding the question of standing, it is not relevant that the substantive issues in the litigation might be nonjusticiable. However, our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. For example, standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause. See *McGowan v. Maryland*, 366 U. S. 420, 429-430 (1961). Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power. Thus, our point of reference in this case is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program. Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of con-

gressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state taxpayer standing in federal courts in *Doremus v. Board of Education*, 342 U. S. 429 (1952). Secondly the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds.²³ In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor

²³ Almost \$1,000,000,000 was appropriated to implement the Elementary and Secondary Education Act in 1965. 79 Stat. 832.

one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1910). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.²⁴ The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment²⁵

²⁴ The Memorial and Remonstrance was Madison's impassioned reaction to a bill introduced in the Virginia General Assembly in 1785, to provide a tax levy to support teachers of the Christian religion. Madison's eloquent opposition to the levy generated strong support in Virginia, and the Assembly postponed consideration of the proposal until its next session. When the bill was revived, it died in committee and the Assembly instead enacted the famous Virginia Bill for Religious Liberty authored by Thomas Jefferson. The Virginia experience is recounted in Cobb, *Rise of Religious Liberty in America* 490-499 (1902).

²⁵ Appellants have also alleged that the Elementary and Secondary Education Act of 1965 violates the Free Exercise Clause of the First Amendment. This Court has recognized that the taxing power can be used to infringe the free exercise of religion. *Murdock v. Pennsylvania*, 319 U. S. 105 (1943). Since we hold that appellants' Establishment Clause claim is sufficient to establish the nexus between their status and the precise nature of the constitutional infringement alleged, we need not decide whether the Free Exercise claim, standing alone, would be adequate to confer standing in this case. We do note, however, that the challenged tax in *Murdock* operated upon a particular class of taxpayers. When such exercises of the taxing

operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.

The allegations of the taxpayer in *Frothingham v. Mellon*, *supra*, were quite different from those made in this case, and the result in *Frothingham* is consistent with the test of taxpayer standing announced today. The taxpayer in *Frothingham* attacked a federal spending program and she, therefore, established the first nexus required. However, she lacked standing because her constitutional attack was not based on an allegation that Congress, in enacting the Maternity Act of 1921, had breached a specific limitation upon its taxing and spending power. The taxpayer in *Frothingham* alleged essentially that Congress, by enacting the challenged statute, had exceeded the general powers delegated to it by Art. I, § 8, and that Congress had thereby invaded the legislative province reserved to the States by the Tenth Amendment. To be sure, Mrs. Frothingham made the additional allegation that her tax liability would be increased as a result of the allegedly unconstitutional enactment, and she framed that allegation in terms of a deprivation of property without due process of law. However, the Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability, and the taxpayer in *Frothingham* failed to make any additional claim that the harm she alleged resulted from a breach by Congress of the specific constitutional limitations imposed upon an exercise of the taxing and spending power. In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative prerogatives and not a federal taxpayer's

power are challenged, the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers within the affected class.

interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power.

We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review. Under such circumstances, we feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution. We lack that confidence in cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.

While we express no view at all on the merits of appellants claims in this case,²⁶ their complaint contains sufficient allegations under the criteria we have outlined to give them standing to invoke a federal court's jurisdiction for an adjudication on the merits.

Reversed.

²⁶ In fact, it is impossible to make any such judgment in the present posture of this case. The proceedings in the court below thus far have been devoted solely to the threshold question of standing, and nothing in the record bears upon the merits of the substantive questions presented in the complaint.

SUPREME COURT OF THE UNITED STATES

No. 416.—OCTOBER TERM, 1967.

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[June 10, 1968.]

MR. JUSTICE DOUGLAS, concurring.

While I have joined the opinion of the Court, I do not think that the test it lays down is a durable one for the reasons stated by my Brother HARLAN. I think, therefore, that it will suffer erosion and in time result in the demise of *Frothingham v. Mellon*, 262 U. S. 447. It would therefore be the part of wisdom, as I see the problem, to be rid of *Frothingham* here and now.

I do not view with alarm, as does my Brother HARLAN, the consequences of that course. *Frothingham*, decided in 1923, was in the heyday of substantive due process, when courts were sitting in judgment on the wisdom or reasonableness of legislation. The claim in *Frothingham* was that a federal regulatory Act dealing with maternity deprived the plaintiff of property without due process of law. When the Court used substantive due process to determine the wisdom or reasonableness of legislation, it was indeed transforming itself into the Court of Revision which was rejected by the Constitutional Convention. It was that judicial attitude, not the theory of standing to sue rejected in *Frothingham*, that involved "important hazards for the continued effectiveness of the federal judiciary," to borrow a phrase from my Brother HARLAN. A contrary result in *Frothingham* in that setting might well have accentuated an ominous trend to judicial supremacy.

But we no longer undertake to exercise that kind of power. Today's problem is in a different setting.

Most laws passed by Congress do not contain even a ghost of a constitutional question. The "political" decisions, as distinguished from the "justiciable" ones, occupy most of the spectrum of congressional action. The case or controversy requirement comes into play only when the Federal Government does something that affects a person's life, his liberty, or his property. The wrong may be slight or it may be grievous. Madison in denouncing state support of churches said the principle was violated when even "three pence" was appropriated to that cause by the Government.¹ It therefore does not do to talk about taxpayers' interest as "infinitesimal." The restraint on "liberty" may be fleeting and passing and still violate a fundamental constitutional guarantee. The "three pence" mentioned by Madison may signal a monstrous invasion by the Government into church affairs, and so on.

The States have experimented with taxpayers' suits and with only two exceptions² now allow them. A few state decisions are frankly based on the theory that a taxpayer is a private attorney general seeking to vindicate the public interest.³ Some of them require that the tax-

¹ Memorial and Remonstrance against Religious Assessments, 2 Writings of James Madison 186 (Hupf, ed., 1901).

² The two clear exceptions are municipal taxpayers' suits in Kansas (see *Asendorf v. Common School Dist. No. 102*, 175 Kan. 601, 266 P. 2d 309 (1954)) and state taxpayers' suits in New York (see *Schieffelin v. Komfort*, 212 N. Y. 520, 106 N. E. 675 (1914); *St. Clair v. Yonkers Raceway*, 13 N. Y. 2d 72, 242 N. Y. S. 2d 43, in 192 N. E. 2d 15 (1963); but see *Kuhn v. Curran*, 294 N. Y. 207, 61 N. E. 2d 513 (1945)).

³ See, e. g., *Clapp v. Town of Jaffrey*, 97 N. H. 456, 91 A. 2d 464 (1952); *Vibberts v. Hart*, 85 R. I. 35, 125 A. 2d 193 (1956); *Lien v. Northwestern Engineering Co.*, 74 S. D. 476, 54 N. W. 2d 472

payer have more than an infinitesimal financial stake in the problem.* At the federal level, Congress can of course define broad categories of "aggrieved" persons who have standing to litigate cases or controversies. But, contrary to what my Brother HARLAN suggests, the failure of Congress to act has not barred this Court from allowing standing to sue and from providing remedies. The multitude of cases under the Fourth, as well as the Fourteenth Amendment, are witness enough.⁵

The constitutional guide is "cases" or "controversies" within the meaning of § 2 of Art. III of the Constitution. As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the

(1952). ("It is now the settled law of this state that a taxpayer or elector having no special interest may institute an action to protect a public right." 74 S. D., at 479, 54 N. W. 2d, at 474.)

* See, e. g., *Crews v. Beattie*, 197 S. C. 32, 14 S. E. 2d 351 (1940); *Goodland v. Zimmerman*, 243 Wis. 459, 10 N. W. 2d 180 (1943) (taxpayer may not enjoin state expenditure of \$1.49); contra, *Richardson v. Blackburn*, 41 Del. Ch. 54, 187 A. 2d 823 (1963); *Woodard v. Riley*, 244 La. 337, 152 So. 2d 41 (1963).

• The estimates of commentators as to how many jurisdictions have specifically upheld taxpayers' suits range from 32 to 40. See generally 3 Davis, *Administrative Law Treatise* § 22.09 (1958), §§ 22.09-22.10 (1965 Supp.); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1276-1281 (1961); Comment, *Taxpayers' Suits: A Survey and Summary*, 69 Yale L. J. 895 (1960); *St. Clair v. Yonkers Raceway*, 13 N. Y. 2d 72, 77-81, 242 N. Y. S. 2d 43, 46, 192 N. E. 2d 15, 17 (1963) (dissenting opinion of Fuld, J.).

⁵ See, e. g., *NAACP v. Alabama*, 357 U. S. 449; *Pierce v. Society of Sisters*, 268 U. S. 510. As the Court said in *Barrows v. Jackson*, 346 U. S. 249, 255, apart from Article III jurisdictional questions, standing involves a "rule of self-restraint for its own governance" which "this Court has developed" itself. And attempts by Congress to confer standing when it is constitutionally lacking are unavailing. *Muskrat v. United States*, 219 U. S. 346.

express provisions of § 2, Art. III. See *Ex parte McCordle*, 7 Wall. 506. But where there is judicial power to act, there is judicial power to deal with all the facets of the old issue of standing.

Taxpayers can be vigilant private attorney generals. Their stake in the outcome of litigation may be *de minimus* by financial standards, yet very great when measured by a particular constitutional mandate. My Brother HARLAN's opinion reflects the British, not the American tradition of constitutionalism. We have a written Constitution; and it is full of "thou shalt nots" directed at Congress and the President as well as at the courts. And the role of the federal courts is not only to serve as referee between the States and the center but also to protect the individual against prohibited conduct by the other two branches of the Federal Government.

There has long been a school of thought here that the less the judiciary does, the better. It is often said that judicial intrusion should be infrequent, since it is "always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors"; that the effect of a participation by the judiciary in these processes is "to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." Thayer, *John Marshall* 106, 107 (1901).

The late Edmond Cahn, who opposed that view, stated my philosophy. He emphasized the importance of the role that the federal judiciary was designed to play in guarding basic rights against majoritarian control. He chided the view expressed by my Brother HARLAN: "... we are entitled to reproach the majoritarian justices of the Supreme Court . . . with straining to be reasonable when they ought to be adamant." Can the

Supreme Court Defend Liberties? in Samuel, ed., *Toward a Better America* (1968) 132, 144. His description of our constitutional tradition was in these words:

"Be not reasonable with inquisitions, anonymous informers, and secret files that mock American justice. Be not reasonable with punitive denationalizations, ex post facto deportations, labels of disloyalty, and all the other stratagems for outlawing human beings from the community of mankind. These devices have put us to shame. Exercise the full judicial power of the United States; nullify them, forbid them; and make us proud again." *Id.*, 144-145.

The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. If the judiciary were to become a super-legislative group sitting in judgment on the affairs of people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.

Marshall wrote in *Marbury v. Madison*, 1 Cranch 137, 178, that if the judiciary stayed its hand in deference to the legislature, it would give the legislature "a practical and real omnipotence." My Brother HARLAN's view would do just that, for unless Congress created a procedure through which its legislative creation could be challenged quickly and with ease, the momentum of what it had done would grind the dissenter under.

We have a Constitution designed to keep government out of private domains. But the fences have often been broken down; and *Frothingham* denied effective machinery to restore them. The Constitution even with the judicial gloss it has acquired plainly is not adequate to

protect the individual against the growing bureaucracy in the Legislative and Executive Branches. He faces a formidable opponent in government, even when he is endowed with funds and with courage. The individual is almost certain to be plowed under, unless he has a well-organized active political group to speak for him. The church is one. The press is another. The union is a third. But if a powerful sponsor is lacking, individual liberty withers—in spite of glowing opinions and resounding constitutional phrases.

I would not be niggardly therefore in giving private attorneys general standing to sue. I would certainly not wait for Congress to give its blessing to our deciding cases clearly within our Article III jurisdiction. To wait for a sign from Congress is to allow important Constitutional questions to go undecided and personal liberty unprotected.

There need be no inundation of the federal courts if taxpayers' suits are allowed. There is a wise judicial discretion that usually can distinguish between the frivolous question and the substantial question, between cases ripe for decision and cases that need prior administrative processing, and the like.⁶ When the judiciary is no longer "a great rock"⁷ in the storm, as Lord Sankey once put it, when the courts are niggardly in the use of their power and reach great issues only timidly and reluctantly the force of the Constitution in the life of the Nation is greatly weakened.

Gideon Hausner, after reviewing the severe security measures sometimes needed for Israel's survival and the

⁶ "The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even successful litigation, and the discretion of the court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks." *Ferry v. Williams*, 41 N. J. L. 332, 339 (Sup. Ct. 1879).

⁷ Quoted in the *Law Times*, March 17, 1928, at 242.

vigilance of her courts in maintaining the rights of individuals, recently stated, "When all is said and done, one is inclined to think that a rigid constitutional frame is on the whole preferable even if it serves no better purpose than obstructing and embarrassing an over-active Executive." *Individuals Rights in the Courts of Israel, International Lawyers Convention In Israel 1958 (1959) 201, 228.*

That observation is apt here, whatever the transgression and whatever branch of government may be implicated. We have recently reviewed the host of devices used by the States to avoid opening to Negroes public facilities enjoyed by whites. *Green v. School Board of Virginia, ante*, p. —; *Raley v. Board of Education, ante*, p. —; *Monroe v. Board of Commissioners, ante*, p. —. There is a like process at work at the federal level in respect to aid to religion. The efforts made to insert in the law an express provision which would allow federal aid to sectarian schools to be reviewable in the courts was defeated.⁸ The mounting federal aid to sectarian schools is notorious and the subterfuges numerous.⁹

⁸ These efforts, commencing in 1961, are discussed in S. Rep. No. 85, 90th Cong., 1st Sess., 2-3 (1967), and S. Rep. No. 473, 90th Cong., 1st Sess., 10-15 (1967). The Senate added such a provision to the Higher Education Facilities Act of 1963, but it did not survive conference. S. Rep. No. 85, at 2. A bill, S. 3, to make certain "establishment" questions reviewable has been reported by the Senate in the Ninetieth Congress.

⁹ "Tuition grants to parents of students in church schools is considered by the clerics and their helpers to have possibilities. The idea here is that the parent receives the money, carries it down to the school, and gives it to the priest. Since the money pauses a moment with the parent before going to the priest, it is argued that this evades the constitutional prohibition against government money for religion! This is a diaphanous trick which seeks to do indirectly what may not be done directly.

"Another one is the 'authority.' The state may not grant aid directly to church schools. But how about setting up an authority—

I would be as liberal in allowing taxpayers standing to object to these violations of the First Amendment as I would in granting standing of people to complain of any invasion of their rights under the Fourth Amendment or the Fourteenth or under any other guarantee in the Constitution itself or in the Bill of Rights.

like the Turnpike Authority? The state could give the money to the authority which, under one pretext or another, could channel it into the church schools.

"Yet another favorite of those who covet sectarian subsidies is 'child benefit.' Government may not aid church schools, but it may aid the children in the schools. The trouble with this argument is that it proves too much. Anything that is done for a school would presumably be of some benefit to the children in it. Government could even build church school classrooms, under this theory, because it would benefit the children to have nice rooms to study in." 21 Church & State (June 1968), p. 5 (editorial).

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No. 416.—OCTOBER TERM, 1967.

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| Florence Flast et al., Appellants, v. Wilbur J. Cohen, Secretary of Health, Education, and Welfare, et al. | } | On Appeal From the United States Dis- trict Court for the Southern District of New York. |
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[June 10, 1968.]

MR. JUSTICE STEWART, concurring.

I join the judgment and opinion of the Court, which I understand to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment. Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution. The present case is thus readily distinguishable from *Frothingham v. Mellon*, 262 U. S. 447, where the taxpayer relied not on an explicit constitutional prohibition but questioned instead the scope of the powers delegated to the national legislature by Article I of the Constitution.

As the Court notes, "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Ante*, at —. Today's decision no more than recognizes that the appellants have a clear stake as taxpayers in assuring that they not be compelled to contribute even "three pence . . . of [their] property for the support of any one establishment." *Ante*, at —. In concluding that the appellants therefore have standing to sue, we do not undermine the

salutary principle, established by *Frothingham* and reaffirmed today, that a taxpayer may not "employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Ante*, at —.

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[June 10, 1968.]

MR. JUSTICE FORTAS, concurring.

I would confine the ruling in this case to the proposition that a taxpayer may maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the Establishment Clause. As the Court's opinion recites, there is enough in the constitutional history of the Establishment Clause to support the thesis that this Clause includes a *specific* prohibition upon the use of the power to tax to support an establishment of religion.* There is no reason to suggest, and no basis in the logic of this decision for implying, that there may be other types of congressional expenditures which may be attacked by a litigant solely on the basis of his status as a taxpayer.

I agree that *Frothingham* does not foreclose today's result. I agree that the congressional powers to tax and spend are limited by the prohibition upon Congress to enact laws "respecting an establishment of religion." This thesis, slender as its basis is, provides a direct "nexus," as the Court puts it, between the use and collection of taxes and the congressional action here. Because of this unique "nexus," in my judgment, it is not far-fetched to recognize that a taxpayer has a special claim to status as a litigant in a case raising the "estab-

*See n. 24, ante.

lishment" issue. This special claim is enough, I think, to permit us to allow the suit, coupled, as it is, with the interest which the taxpayer and all other citizens have in the church-state issue. In terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer—and upon the life of all citizens.

Perhaps the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for this challenge. We need not decide this. But certainly, I believe, we must recognize that our principle of judicial scrutiny of legislative acts which raise important constitutional questions requires that the issue here presented—the separation of state and church—which the Founding Fathers regarded as fundamental to our constitutional system—should be subjected to judicial testing. This is not a question which we, if we are to be faithful to our trust, should consign to limbo, unacknowledged, unresolved, and undecided.

On the other hand, the urgent necessities of this case and the precarious opening through which we find our way to confront it, do not demand that we open the door to a general assault upon exercises of the spending power. The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause. See concurring opinion of STEWART, J., *anté*.

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[June 10, 1968.]

MR. JUSTICE HARLAN, dissenting.

The problems presented by this case are narrow and relatively abstract, but the principles by which they must be resolved involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system. The nub of my view is that the end result of *Frothingham v. Mellon*, 262 U. S. 447, was correct, even though, like others,¹ I do not subscribe to all of its reasoning and premises. Although I therefore agree with certain of the conclusions reached today by the Court,² I cannot accept the standing doctrine that it substitutes for *Frothingham*, for it seems to me that this new doctrine rests on premises that do not withstand analysis. Accordingly, I respectfully dissent.

I.

It is desirable first to restate the basic issues in this case. The question here is not, as it was not in *Frothingham*, whether "a federal taxpayer is without standing to challenge the constitutionality of a federal statute."

¹ See, e. g., Davis, Standing to Challenge Governmental Action, 39 Minn. L. Rev. 353; L. Jaffe, Judicial Control of Administrative Action 483-495 (1965).

² In particular, I agree, essentially for the reasons stated by the Court, that we do not lack jurisdiction under 28 U. S. C. § 1253 to consider the judgment of the three-judge District Court.

Ante, at 1. It could hardly be disputed that federal taxpayers may, as taxpayers, contest the constitutionality of tax obligations imposed severally upon them by federal statute. Such a challenge may be made by way of defense to an action by the United States to recover the amount of a challenged tax debt, see, *e. g.*, *Hylton v. United States*, 3 Dall. 171; *McCray v. United States*, 195 U. S. 27; *United States v. Butler*, 297 U. S. 1; or to a prosecution for willful failure to pay or to report the tax. See, *e. g.*, *Marchetti v. United States*, 390 U. S. 39. Moreover, such a challenge may provide the basis of an action by a taxpayer to obtain the refund of a previous tax payment. See, *e. g.*, *Bailey v. Drexel Furniture Co.*, 259 U. S. 20.

The lawsuits here and in *Frothingham* are fundamentally different. They present the question whether federal taxpayers *qua* taxpayers may, in suits in which they do not contest the validity of their previous or existing tax obligations, challenge the constitutionality of the uses for which Congress has authorized the expenditure of public funds. These differences, in the purposes of the cases are reflected in differences in the litigants' interests. An action brought to contest the validity of tax liabilities assessed to the plaintiff is designed to vindicate interests that are personal and proprietary. The wrongs alleged and the relief sought by such a plaintiff are unmistakably private; only secondarily are his interests representative of those of the general population. I take it that the Court, although it does not pause to examine the question, believes that the interests of those who as taxpayers challenge the constitutionality of public expenditures may, at least in certain circumstances, be similar. Yet this assumption is surely mistaken.³

³ I put aside, for the moment, the suggestion that taxpayer's rights under the Establishment Clause are more "personal" than they are under any other constitutional provision.

The complaint in this case, unlike that in *Frothingham*, contains no allegation that the contested expenditures will in any fashion affect the amount of these taxpayers' own existing or foreseeable tax obligations. Even in cases in which such an allegation is made, the suit cannot result in an adjudication either of the plaintiff's tax liabilities or of the propriety of any particular level of taxation. The relief available to such a plaintiff consists entirely of the vindication of rights held in common by all citizens. It is thus scarcely surprising that few of the state courts that permit such suits require proof either that the challenged expenditure is consequential in amount or that it is likely to affect significantly the plaintiff's own tax bill; these courts have at least impliedly recognized that such allegations are surplusage, useful only to preserve the form of an obvious fiction.*

Nor are taxpayers' interests in the expenditure of public funds differentiated from those of the general public by any special rights retained by them in their tax payments. The simple fact is that no such rights can sensibly be said to exist. Taxes are ordinarily levied by the United States without limitations of purpose; absent such a limitation, payments received by the Treasury in satisfaction of tax obligations lawfully created become part of the Government's general funds. The national legislature is required by the Constitution to exercise its spending powers "to provide for the common Defence and general Welfare." Art. I, § 8, cl. 1. Whatever other implications there may be to that sweeping phrase, it surely means that the United States holds its general funds, not as stakeholder or trustee for those who have paid its imposts, but as surrogate for the population at large. Any rights of a taxpayer with respect to the purposes for which those funds are expended are

* See generally Comment, Taxpayers' Suits: A Survey and Summary, 69 Yale L. J. 895, 905-906.

thus subsumed in, and extinguished by, the common rights of all citizens. To characterize taxpayers' interests in such expenditures as proprietary or even personal either deprives those terms of all meaning or postulates for taxpayers a *scintilla juris* in funds that no longer are theirs.

Surely it is plain that the rights and interests of taxpayers who contest the constitutionality of public expenditures are markedly different from those of "Hohfeldian" plaintiffs,⁵ including those taxpayer-plaintiffs who challenge the validity of their own tax liabilities. We must recognize that these non-Hohfeldian plaintiffs complain, just as the petitioner in *Frothingham* sought to complain, not as taxpayers, but as "private attorneys-general."⁶ The interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general population, taxpayers and nontaxpayers alike. These are and must be, to adopt Professor Jaffe's useful phrase, "public actions" brought to vindicate public rights.⁷

It does not, however, follow that suits brought by non-Hohfeldian plaintiffs are excluded by the "case or controversy" clause of Article III of the Constitution from the jurisdiction of the federal courts. This and other

⁵ The phrase is Professor Jaffe's, adopted, of course, from W. Hohfeld, *Fundamental Legal Conceptions* (1923). I have here employed the phrases "Hohfeldian" and "non-Hohfeldian" plaintiffs to mark the distinction between the personal and proprietary interests of the traditional plaintiff, and the representative and public interests of the plaintiff in a public action. I am aware that we are confronted here by a spectrum of interests of varying intensities, but the distinction is sufficiently accurate, and convenient, to warrant its use at least for purposes of discussion.

⁶ Cf. *Associated Industries v. Ickes*, 134 F. 2d 694, 704; *Reade v. Ewing*, 205 F. 2d 630, 632.

⁷ L. Jaffe, *Judicial Control of Administrative Action* 483 (1965).

federal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as "representatives of the public interest." *Scripps-Howard Radio v. Comm'n*, 316 U. S. 4, 15. See also *Commission v. Sanders Radio Station*, 309 U. S. 470, 477; *Associated Industries v. Ickes*, 134 F. 2d 694; *Reade v. Ewing*, 205 F. 2d 630; *Scenic Hudson Preservation Conf. v. FPC*, 354 F. 2d 608; *Office of Communication of United Church of Christ v. FCC*, 359 F. 2d 994. Compare *Oklahoma v. Civil Service Comm'n*, 330 U. S. 127, 137-139. And see, on actions *qui tam*, *Marvin v. Trout*, 199 U. S. 212, 225; *United States ex rel. Marcus v. Hess*, 317 U. S. 537, 546. The various lines of authority are by no means free of difficulty, and certain of the cases may be explicable as involving a personal, if remote, economic interest, but I think that it is, nonetheless, clear that non-Hohfeldian plaintiffs as such are not constitutionally excluded from the federal courts. The problem ultimately presented by this case is, in my view, therefore to determine in what circumstances, consonant with the character and proper functioning of the federal courts, such suits should be permitted.* With this preface, I shall examine the position adopted by the Court.

II.

As I understand it, the Court's position is that it is unnecessary to decide in what circumstances public actions should be permitted, for it is possible to identify situations in which taxpayers who contest the constitu-

* I agree that implicit in this question is the belief that the federal courts may decline to accept for adjudication cases or questions that, although otherwise within the perimeter of their constitutional jurisdiction, are appropriately thought to be unsuitable at least for immediate judicial resolution. Compare *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 345-348; H. Wechsler, *Principles, Politics, and Fundamental Law* 9-15 (1961); and Bickel, *Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 45-47.

tionality of federal expenditures assert "personal" rights and interests, identical in principle to those asserted by Hohfeldian plaintiffs. This position, if supportable, would of course avoid many of the difficulties of this case; indeed, if the Court is correct, its extended exploration of the subtleties of Article III is entirely unnecessary. But, for reasons that follow, I believe that the Court's position is untenable.

The Court's analysis consists principally of the observation that the requirements of standing are met if a taxpayer has the "requisite personal interest in the outcome" of his suit. *Ante*, at 17. This does not, of course, resolve the standing problem; it merely restates it. The Court implements this standard with the declaration that taxpayers will be "deemed" to have the necessary personal interest if their suits satisfy two criteria: *first*, the challenged expenditure must form part of a federal spending program, and not merely be "incidental" to a regulatory program; and *second*, the constitutional provision under which the plaintiff claims must be a "specific limitation" upon Congress' spending powers. The difficulties with these criteria are many and severe, but it is enough for the moment to emphasize that they are not in any sense a measurement of any plaintiff's interest in the outcome of any suit. As even a cursory examination of the criteria will show, the Court's standard for the determination of standing and its criteria for the satisfaction of that standard are entirely unrelated.

It is surely clear that a plaintiff's interest in the outcome of a suit in which he challenges the constitutionality of a federal expenditure is not made greater or smaller by the unconnected fact that the expenditure is, or is not, "incidental" to an "essentially regulatory program."⁹

⁹ I must note at the outset that I cannot determine with any certainty the Court's intentions with regard to this first criterion. Its use of *Doremus v. Board of Education*, 342 U. S. 429, as an

An example will illustrate the point. Assume that two independent federal programs are authorized by Congress, that the first is designed to encourage a specified religious group by the provision to it of direct grants-in-aid, and that the second is designed to discourage all other religious groups by the imposition of various forms of discriminatory regulation. Equal amounts are appropriated by Congress for the two programs. If a taxpayer challenges their constitutionality in separate suits,¹⁰ are we to suppose, as evidently does the Court, that his "personal stake" in the suit involving the second is necessarily smaller than it is in the suit involving the first, and that he should therefore have standing in one but not the other?

Presumably the Court does not believe that regulatory programs are necessarily less destructive of First Amendment rights, or that regulatory programs are necessarily less prodigal of public funds than are grants-in-aid, for both these general propositions are demonstrably false. The Court's disregard of regulatory expenditures is not even a logical consequence of its apparent assumption that taxpayer-plaintiffs assert essentially monetary in-

analogue perhaps suggests that it intends to exclude only those cases in which there are virtually no public expenditures. See, e. g., *Howard v. City of Boulder*, 132 Colo. 401, 290 P. 2d 237. On the other hand, the Court also emphasizes that the contested programs may not be "essentially regulatory programs," and that the statute challenged here "involves a *substantial* expenditure of federal tax funds." *Ante*, at 19 (emphasis added). Presumably this means that the Court's standing doctrine also excludes any program in which the expenditures are "insubstantial" or which cannot be characterized as a "spending" program.

¹⁰ I am aware that the attack upon the second program would presumably be premised, at least in large part, upon the Free Exercise Clause, and that the Court does not today hold that that clause is within its standing doctrine. I cannot, however, see any meaningful distinction for these purposes, even under the Court's reasoning, between the two religious clauses.

terests, for it surely cannot matter to a taxpayer *qua* taxpayer whether an unconstitutional expenditure is used to hire the services of regulatory personnel or is distributed among private and local governmental agencies as grants-in-aid. His interest as taxpayer arises, if at all, from the fact of an unlawful expenditure, and not as a consequence of the expenditure's form. Apparently the Court has repudiated the emphasis in *Frothingham* upon the amount of the plaintiff's tax bill, only to substitute an equally irrelevant emphasis upon the form of the challenged expenditure.

The Court's second criterion is similarly unrelated to its standard for the determination of standing. The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a "specific limitation" upon Congress' spending powers. Thus, among the claims in *Frothingham* was the assertion that the Maternity Act, 42 Stat. 224, deprived the petitioner of property without due process of law. The Court has evidently concluded that this claim did not confer standing because the Due Process Clause of the Fifth Amendment is not a specific limitation upon the spending powers.¹¹ Disregarding for the moment the formidable obscurity of the Court's categories, how can it be said that Mrs. Frothingham's interests in her suit were, as a consequence of her choice of a constitutional claim, necessarily less intense than those, for example, of the

¹¹ It should be emphasized that the Court finds it unnecessary to examine the history of the Due Process Clause to determine whether it was intended as a "specific limitation" upon Congress' spending and taxing powers. Nor does the Court pause to examine the purposes of the Tenth Amendment, another of the premises of the constitutional claims in *Frothingham*. But see *Gibbons v. Ogden*, 9 Wheat. 1, 199; *Veazie Bank v. Fenno*, 8 Wall. 533, 541; *United States v. Butler*, 297 U. S. 1. And compare *Everson v. Board of Education*, 330 U. S. 1, 6.

present appellants? I am quite unable to understand how, if a taxpayer believes that a given public expenditure is unconstitutional, and if he seeks to vindicate that belief in a federal court, his interest in the suit can be said necessarily to vary according to the constitutional provision under which he states his claim.

The absence of any connection between the Court's standard for the determination of standing and its criteria for the satisfaction of that standard is not merely a logical ellipsis. Instead, it follows quite relentlessly from the fact that, despite the Court's apparent belief, the plaintiffs in this and similar suits are non-Hohfeldian, and it is very nearly impossible to measure sensibly any differences in the intensity of their personal interests in their suits. The Court has thus been compelled simply to postulate situations in which such taxpayer-plaintiffs will be "deemed" to have the requisite "personal stake and interest." *Ante*, at 17. The logical inadequacies of the Court's criteria are thus a reflection of the deficiencies of its entire position. These deficiencies will, however, appear more plainly from an examination of the Court's treatment of the Establishment Clause.

Although the Court does not altogether explain its position, the essence of its reasoning is evidently that a taxpayer's claim under the Establishment Clause is "not merely one of ultra vires," but instead asserts "an abridgment of individual religious liberty" and a "governmental infringement of individual rights protected by the Constitution." Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Calif. L. Rev. 260, 276. It must first be emphasized that this is apparently not founded upon any "preferred" position for the First Amendment, nor upon any asserted unavailability of other plaintiffs.¹²

¹² The Court does make one reference to the availability *vel non* of other plaintiffs. It indicates that where a federal statute is directed at a specified class, "the proper party emphasis in the

The Court's position is instead that, because of the Establishment Clause's historical purposes, taxpayers retain rights under it quite different from those held by them under other constitutional provisions.

The difficulties with this position are several. First, we have recently been reminded that the historical purposes of the religious clauses of the First Amendment are significantly more obscure and complex than this Court has heretofore acknowledged.¹³ Careful students of the history of the Establishment Clause have found that "it is impossible to give a dogmatic interpretation of the First Amendment, and to state with any accuracy the intention of the men who framed it" ¹⁴ Above all, the evidence seems clear that the First Amendment was not intended simply to enact the terms of Madison's Memorial and Remonstrance Against Religious Assessments.¹⁵ I do not suggest that history is without rele-

federal standing doctrine would require that standing be limited to the taxpayers within the affected class." *Ante*, at 20-21, n. 25. Assuming *arguendo* the existence of such a federal "best-plaintiff" rule, it is difficult to see why this rule would not altogether exclude taxpayers as plaintiffs under the Establishment Clause, since there plainly may be litigants under the Clause with the personal rights and interests of Hohfeldian plaintiffs. See, e. g., *Board of Education v. Allen*, decided today, *ante*, at —.

¹³ See, in particular, M. Howe, *The Garden and the Wilderness*, F-31 (1965); C. Antieau, A. Downey & E. Roberts, *Freedom from Federal Establishment* (1964). Not all members of the Court have of course ignored the complexities of the clause's history. See especially *McCullum v. Board of Education*, 333 U. S. 203, 238 (dissenting opinion of Reed, J.).

¹⁴ Antieau, Downey & Roberts, *supra*, at 142. See also Howe, *supra*, at 10-12.

¹⁵ See, in particular, Antieau, Downey & Roberts, *supra*, at 126-128, 144-146, 207-208. And see 1 *Annals of Cong.* 730-731. It has elsewhere been observed, I think properly, that "to treat [Madison's Remonstrance] as authoritatively incorporated in the First Amendment is to take grotesque liberties with the simple legislative process, and even more with the complex and diffuse process of

vance to these questions, or that the use of federal funds for religious purposes was not a form of establishment that many in the 18th century would have found objectionable. I say simply that, given the ultimate obscurity of the Establishment Clause's historical purposes, it is inappropriate for this Court to draw fundamental distinctions among the several constitutional commands upon the supposed authority of isolated dicta extracted from the clause's complex history. In particular, I have not found, and the opinion of the Court has not adduced, historical evidence that properly permits the Court to distinguish, as it has here, among the Establishment Clause, the Tenth Amendment and the Due Process Clause of the Fifth Amendment as limitations upon Congress' taxing and spending powers.¹⁶

The Court's position is equally precarious if it is assumed that its premise is that the Establishment Clause is in some uncertain fashion a more "specific" limitation upon Congress' powers than are the various other constitutional commands. It is obvious, first, that only in some Pickwickian sense are any of the provisions with which the Court is concerned "specific[ally]" limitations

ratification of an Amendment by three-fourths of the states." *Brown, Quis Custodiet Ipsos Custodes?*—The School-Prayer Cases, 1963 Sup. Ct. Rev. 1, 8.

¹⁶ I will of course grant that claims under, for example, the Tenth Amendment may present "generalized grievances about the conduct of government or the allocation of power in the Federal System." *Ante*, at 22. I will also grant that it would be well if such questions could be avoided by the federal courts. Unfortunately, I cannot see how these considerations are relevant under the Court's principal criterion, which I understand to be merely whether any given constitutional provision is, or is not, a limitation upon Congress' spending powers. It is difficult to see what there is in the fact that a constitutional provision is held to be such a limitation that could sensibly give the Court "confidence" about the fashion in which a given plaintiff will present a given issue.

upon spending, for they contain nothing that is expressly directed at the expenditure of public funds. The specificity to which the Court repeatedly refers must therefore arise, not from the provisions' language, but from something implicit in their purposes. But this Court has often emphasized that Congress' powers to spend are coterminous with the purposes for which, and methods by which, it may act, and that the various constitutional commands applicable to the central government, including those implicit both in the Tenth Amendment and in the General Welfare Clause, thus operate as limitations upon spending. See *United States v. Butler*, 297 U. S. 1. And see, e. g., *Veazie Bank v. Fenno*, 8 Wall. 533, 541; *Loan Association v. Topeka*, 20 Wall. 665, 664; *Thompson v. Consolidated Gas Co.*, 300 U. S. 55, 80; *Carmichael v. Southern Coal Co.*, 301 U. S. 495; *Everson v. Board of Education*, *supra*, at 6. Compare *Steward Machine Co. v. Davis*, 301 U. S. 548; *Helvering v. Davis*, 301 U. S. 619. I can attach no constitutional significance to the various degrees of specificity with which these limitations appear in the terms or history of the Constitution. If the Court accepts the proposition, as I do, that the number and scope of public actions should be restricted, there are, as I shall show, methods more appropriate, and more nearly permanent, than the creation of an amorphous category of constitutional provisions that the Court has deemed, without adequate foundation, "specific limitations" upon Congress' spending powers.

Even if it is assumed that such distinctions may properly be drawn, it does not follow that federal taxpayers hold any "personal constitutional right" such that they may each contest the validity under the Establishment Clause of all federal expenditures. The difficulty, with which the Court never comes to grips, is that taxpayers' suits under the Establishment Clause are not in these circumstances meaningfully different from other public

actions. If this case involved a tax specifically designed for the support of religion, as was the Virginia tax opposed by Madison in his Memorial and Remonstrance,¹⁷ I would agree that taxpayers have rights under the religious clauses of the First Amendment that would permit them standing to challenge the tax's validity in the federal courts. But this is not such a case, and appellants challenge an expenditure, not a tax. Where no such tax is involved, a taxpayer's complaint can consist only of an allegation that public funds have been, or shortly will be, expended for purposes inconsistent with the Constitution. The taxpayer cannot ask the return of any portion of his previous tax payments, cannot prevent the collection of any existing tax debt, and cannot demand an adjudication of the propriety of any particular level of taxation. His tax payments are received for the general purposes of the United States, and are, upon proper receipt, lost in the general revenues. Compare *Seward Machine Co. v. Davis*, *supra*, at 585. The interests he represents, and the rights he espouses, are, as they are in all public actions, those held in common by all citizens. To describe those rights and interests as personal, and to intimate that they are in some unspecified fashion to be differentiated from those of the general public, reduces constitutional standing to a word game played by secret rules.¹⁸

¹⁷ The bill was intended to establish "a provision for teachers of the Christian religion." It and the Memorial and Remonstrance are reprinted in *Everson v. Board of Education*, *supra*, at 63-74.

¹⁸ I have equal difficulty with the argument that the religious clauses of the First Amendment create a "personal constitutional right," held by all citizens, such that any citizen may, under those clauses, contest the constitutionality of federal expenditures. The essence of the argument would presumably be that freedom from establishment is a right that inheres in every citizen, thus any citizen should be permitted to challenge any measure that conceivably involves establishment. Certain provisions of the Con-

Apparently the Court, having successfully circumnavigated the issue, has merely returned to the proposition from which it began. A litigant, it seems, will have standing if he is "deemed" to have the requisite interest, and "if you . . . have standing, then you can be confident you are" suitably interested. Brown, *Quis Custodiet Ipsos Custodes?*—The School-Prayer Cases, 1963 Sup. Ct. Rev. 1, 22.

III.

It seems to me clear that public actions, whatever the constitutional provisions on which they are premised, may

stitution, so the argument would run, create the basic structure of our society and of its government, and accordingly should be enforceable at the demand of every individual. Unlike the position taken today by the Court, such a doctrine of standing would at least be internally consistent, but it would also threaten the proper functioning both of the federal courts and of the principle of separation of powers. The Establishment Clause is, after all, only one of many provisions of the Constitution that might be characterized in this fashion. Certain of these provisions, *e. g.*, the Ninth and Tenth Amendments, would provide the basis for cases that, absent a standing question, could not readily be excluded from the federal courts as involving political questions, or as otherwise unsuitable for adjudication under the principles formulated for these purposes by the Court. Compare *United Public Workers v. Mitchell*, 330 U. S. 75, 94-96; *Griswold v. Connecticut*, 381 U. S. 479. Indeed, it might even be urged that the Ninth and Tenth Amendments, since they are largely confirmatory of rights created elsewhere in the Constitution, were intended to declare the standing of individual citizens to contest the validity of governmental activities. It may, of course, also be argued that these amendments are merely "tub[s] for the whale," W. Crosskey, *1 Politics and the Constitution* 688 (1953); but lacking such an argument, any doctrine of standing premised upon the generality or relative importance of a constitutional command would, I think, very substantially increase the number of situations in which individual citizens could present for adjudication "generalized grievances about the conduct of government." I take it that the Court, apart from my Brother DOUGLAS, and I are agreed that any such consequence would be exceedingly undesirable.

involve important hazards for the continued effectiveness of the federal judiciary. Although I believe such actions to be within the jurisdiction conferred upon the federal courts by Article III of the Constitution, there surely can be little doubt that they strain the judicial function and press to the limit judicial authority. There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government. It is not, I submit, enough to say that the present members of the Court would not seize these opportunities for abuse, for such actions would, even without conscious abuse, go far toward the final transformation of this Court into the Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention.¹⁹ I do not doubt that there must be "some effectual power in the government to restrain or correct the infractions"²⁰ of the Constitution's several commands, but neither can I suppose that such power resides only in the federal courts. We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government "are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas R. Co. v. May*, 194 U. S. 267, 270. The powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government.

Presumably the Court recognizes at least certain of these hazards, else it would not have troubled to impose limitations upon the situations in which, and purposes

¹⁹ See 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 21, 97-93, 108-110, 138-140 (1911); 2 Farrand, *id.*, at 73-80.

²⁰ The Federalist No. 80 (Hamilton).

for which, such suits may be brought. Nonetheless, the limitations adopted by the Court are, as I have endeavored to indicate, wholly untenable. This is the more unfortunate because there is available a resolution of this problem that entirely satisfies the demands of the principle of separation of powers. This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits. See especially *Oklahoma v. Civil Service Comm'n*, *supra*, at 137-139. Compare *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 125-127. I would adhere to that principle.²¹ Any hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President. I appreciate that this Court does not ordinarily await the mandate of other branches of the Government, but it seems to me that the extraordinary character of public actions, and of the mis-

²¹ My premise is, as I have suggested, that non-Hohfeldian plaintiffs as such are not excluded by Article III from the jurisdiction of the federal courts. The problem is therefore to determine in what situations their suits should be permitted, and not whether a "statute constitutionally could authorize a person who shows no case or controversy to call on the courts . . ." *Scripps-Howard Radio v. Comm'n*, *supra*, at 21 (dissenting opinion). I do not, of course, suggest that Congress' power to authorize suits by specified classes of litigants is without constitutional limitation. This Court has recognized a panoply of restrictions upon the actions that may properly be brought in federal courts, or reviewed by this Court after decision in state courts. It is enough now to emphasize that I would not abrogate these restrictions in situations in which Congress has authorized a suit. The difficult case of *Muskat v. United States*, 219 U. S. 346, does not require more. Whatever the other implications of that case, it is enough to note that there the United States, as statutory defendant, evidently had "no interest adverse to the claimants." *Id.*, at 361.

chievous, if not dangerous, consequences they involve for the proper functioning of our constitutional system, and in particular of the federal courts, make such judicial forbearance the part of wisdom.²² It must be emphasized that the implications of these questions of judicial policy are of fundamental significance for the other branches of the Federal Government.

Such a rule could readily be applied to this case. Although various efforts have been made in Congress to authorize public actions to contest the validity of federal expenditures in aid of religiously affiliated schools and other institutions, no such authorization has yet been given.²³

This does not mean that we would, under such a rule, be enabled to avoid our constitutional responsibilities, or that we would confine to limbo the First Amendment or any other constitutional command. The question here is not, despite the Court's unarticulated

²² I am aware that there is a second category of cases in which the Court has entertained claims by non-Hohfeldian plaintiffs: suits brought by state or local taxpayers in state courts to vindicate federal constitutional claims. A certain anomaly may be thought to have resulted from the Court's consideration of such cases while it has refused similar suits brought by federal taxpayers in the federal courts. This anomaly, if such it is, will presumably continue even under the standing doctrine announced today, since we are not told that the standing rules will hereafter be identical for the two classes of taxpayers. Although these questions are not now before the Court, I think it appropriate to note that one possible solution would be to hold that standing to raise federal questions is itself a federal question. See Freund, in E. Cahn, *Supreme Court and Supreme Law* 35 (1954). This would demand partial reconsideration of, for example, *Doremus v. Board of Education*, *supra*. Cf. *United States v. Raines*, 362 U. S. 17, 23, n. 3; *Cramp v. Board of Public Education*, 368 U. S. 278, 282; *Baker v. Carr*, 369 U. S. 186, 204.

²³ This question was, however, extensively discussed in the course of the debates upon the Elementary and Secondary Education Act of 1965, 79 Stat. 27. See, e. g., 111 Cong. Rec. 5973, 6132, 7316-7318.

premise, whether the religious clauses of the First Amendment are hereafter to be enforced by the federal courts; the issue is simply whether an *additional* category of plaintiffs, heretofore excluded from those courts, are to be permitted to maintain suits. The recent history of this Court is replete with illustrations, including even one announced today (*supra*, at n. 12), that questions involving the religious clauses will not, if federal taxpayers are prevented from contesting federal expenditures, be left "unacknowledged, unresolved, and undecided."

Accordingly, for the reasons contained in this opinion, I would affirm the judgment of the District Court.

